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The remarkable decision of Judge Parker, of the United States District Court of Arkansas, setting aside or rather disregarding an order of the highest judicial tribunal of the country, has attracted considerable attention and comment, not only because such action is unusual if not unprecedented, but also because it appears to demonstrate quite plainly that the Supreme Court of the United States is in error. There is no dispute about the facts of the case, the whole controversy turning upon a question of law. A man named Hudson was convicted in Judge Parker's court of assault with intent to kill and sentenced to prison for a term of four years. He applied to Justice White, of the Supreme Court, for a writ of error to operate as a supersedeas and it was granted, the defendant being admitted to bail in the sum of $5,000, an order being signed by Justice White to that effect, the sufficiency of the bond to be subject to the approval of Judge Parker. The latter, at the commencement of his opinion, stated that this was one of the most important questions ever presented to his court, "for if bail is taken upon this order and it is not warranted by law, then the bail bond is void and the sureties would not be responsible." Though no special concern was felt as to the first part of the order granting a supersedeas, it was noticed by Judge Parker that there was no requirement of a bond for costs. The writ of error in a criminal case must be prosecuted at the expense of the defendant. To secure a stay by supersedeas in a civil case it would be necessary to file a bond for the payment of all costs. The bond ordered by Justice White was simply to secure the appearance of the defendant when and where he may be required to appear. If the rule in civil cases is as above stated it seems to be much more important that it should be the rule in criminal cases.

But the material question which Judge Parker was called upon to determine was whether the bond as ordered by Justice White was valid. Judge Parker's decision is to the effect that this order is unauthorized, and that the Supreme Court has no right, either by the common law, the constitution, or any federal statute, to admit a defendant to bail after conviction and pending an appeal. He grants that congress has power to pass a law giving such a right, but declares that no law of that kind has ever been passed. "Bail is a great fundamental right," he says, "to be provided for by an act of congress only, and unless congress has provided for its being taken, then it can not be taken," and any order to the contrary by any court is accordingly invalid.

It is generally assumed that any action taken by the Supreme Court must necessarily be correct and conclusive; but Judge Parker points out that the Supreme Court, like all inferior Federal Courts, derives its authority exclusively from the constitution and the laws made in pursuance thereof, and that it cannot in any other way obtain jurisdiction or the right to pass judgment in any case or upon any question. This is a well-known fact, of course, but it has never before been emphasized by a proceeding apparently in violation of it. The order of Justice White was made, it is to be presumed, as a rule of procedure for the practical conduct of business; but Judge Parker maintains, with ample authorities to support the contention, that the taking of bail does not come within the range of the rules of practice and procedure which the Supreme Court, in common with other courts, has the right to adopt for the regulation of its proceedings. "It is clear to my mind," he says, "that the provision of the constitution with regard to excessive bail is not self-executing, but requires the legislation of congress to make it effective, and that it applies to persons who are accused, but have not been tried and convicted." He adds that he has been unable to find a single case against this principle and that in the States where admission to bail after conviction and pending appeal exists, it is by virtue of an express statute and then it is always left discretionary with the trial court. A reading of Judge Parker's well written opinion irresistibly induces the belief that Justice White has made a mistake in this matter and issued an order for which there is no warrant of law.

NOTES OF RECENT DECISIONS.

BANKS AND BANKING—INSOLVENCY—COUNTY FUNDS—PREFERENCE.—The United States Circuit Court, District of Oregon, decide in Multnomah County v. Oregon Nat. Bank, that a county whose funds are deposited in a bank that fails has no preference over other depositors as to the bank assets, where the identity of the funds deposited by the county has been lost. The court says:

The vital question presented by these exceptions is the question, can the county and city whose funds have been wrongfully commingled with the funds of the bank, and paid out, secure a preference over other creditors or a lien on the property of the bank in the hands of an assignee? It is settled that a person may follow and reclaim his property, wrongfully appropriated by another, so long as he can find it. If its form has been changed, he may follow the substantial equivalent of his property in whatever form. The property into which his own has been changed is impressed with a trust in his favor. But the great weight of authority is against any extension of the rule beyond this. The cases most relied upon by the complainants were those in the Supreme Court of Wisconsin, but, since the argument, defendant has called my attention to the case of Silk Co. v. Flanders (decided in the Supreme Court of Wisconsin in March of this year) 58 N. W. Rep. 383, which overrules former decisions upon this question, and declares the doctrine that when trust money becomes so mixed up with the trustees' individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases; that the court will go as far as it can in thus tracing and following trust money, but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. The recent cases of Slater v. Oriental Mills (by the Supreme Court of Rhode Island) 27 Atl. Rep. 443, and Association v. Austin (Supreme Court of Alabama) 13 South. Rep. 908, are to the same effect. The case of Shields v. Thomas (Supreme Court of Mississippi) 14 South. Rep. 84, is similar to the present case in its facts. The sheriff of a county, without authority, deposited in a bank, which shortly afterwards failed, taxes collected by him, the officers of the bank knowing the character of the fund. The cash that came into the hands of the receiver of such bank was less than the amount of such fund, and it did not appear that the fund, or any part of it, came into the receiver's hands, either in its original form or as a part of the mass of the bank's assets. The court refused to make the payment of such fund out of the assets in the receiver's hands a charge upon such assets precedent to the claims of other creditors of the bank. These are all recent and well-considered cases, and each of them contains a large number of citations in support of the conclusion reached.

Among the cases against these authorities is that of San Diego Co. v. California Nat. Bank, 52 Fed. Rep. 59, also a recent case. In this case Judge Ross says: "The ordinary creditors became such voluntarily. They deposited their money with the bank with their eyes open. But the money of the complaint was deposited by its officers and received by the bank, not only without the knowledge of the complainant, but contrary to law. To put the complainant on the same terms with the ordinary creditors is to make the former share in a loss to which it did not voluntarily subject itself, and to give to the latter a share in money which never in equity became the property of the bank. This is certainly not just."

Notwithstanding the respect in which I hold the opinion of Judge Ross, I cannot adopt this view in the face of the cases that hold the other doctrine. The correctness of his conclusion as to the injustice of giving the general creditors of the bank a share in the money, which never in equity became the property of the bank, cannot be questioned. But this is not what happens in the cases under consideration. It does not appear that the money for distribution includes any part of that belonging to the involuntary creditor. If this did appear, the lien of such creditor would attach, and he would have his preference. The fact that the money of such creditor or *cestui que trust* cannot be traced to the fund sought to be charged is the reason that the preference is refused. If his money has been paid out, or has otherwise disappeared, it would not be just that he should take, to the exclusion of the general creditors of the bank, who are in no way responsible for the bank's delinquency, and whose deposits may comprise the entire fund which such creditor seeks to appropriate to his exclusive use. His so-called right of preference in, other words, cannot in justice extend to the property of others. The theory of preference does not apply in these cases. There is no preference by reason of an unlawful conversion. The so-called right to be preferred in the case of a wrongful conversion is a right of ownership, —a right of property; a right which lays hold of the property whether in its original or in a substituted form; a right which follows the proposition so long as it can be ascertained to be the same property or its product, and only does so because the property to be reached can be ascertained to be the same property or its product. When the means of ascertainment of the identity of property or proceeds fail, the right fails. I therefore conclude that neither the county of Multnomah nor the city of Portland is entitled to the preference claimed.

DEATH BY WRONGFUL ACT—SALE OF HORSE WITH GLANDERS — DAMAGES.—The case of State v. Fox, 29 Atl. Rep. 601, decided by the Court of Appeals of Maryland, is something new in the line of cases involving question of tort. It was held that where the vendor of a horse fraudulently conceals the fact that it is afflicted with glanders, he is liable for the death of one employed to care for the horse, who contracts the disease, if such is the probable and natural consequence of contact therewith, and that in an action against the vendor of a horse for death caused by glanders contracted therefrom, an allegation that the disease "may easily be communicated to human beings" is insufficient to charge that it was contracted as a natural and probable consequence of contact therewith. Boyd, J., says:

Article 67, § 1, of our Code, provides that "when-

ever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action of damages, notwithstanding the death of the person injured," etc. We are therefore to determine whether, under the facts admitted by the demurrer, John W. Hartlove, if he had survived, could have recovered under his declaration. It is said in Benjamin on Sales (section 431), that a "man may make himself liable in an action founded on tort, for fraud or deceit or negligence in respect of a contract, brought by parties with whom he has not contracted, by a stranger, by any one of the public at large who may be injured by such deceit or negligence," although this statement is somewhat qualified in the later edition of that work. The main difficulty consists in applying the principles applicable to such actions to the facts of the particular cases. We will therefore examine into some of the authorities which have been brought to our attention, to ascertain what the various courts have determined, with a view of applying what we deem to be the correct principles to the circumstances of this case:

The case of Thomas v. Winchester, 6 N. Y. 397, is one of those mainly relied on by appellants. It has probably gone further than most of the cases, and has been somewhat criticised by some authorities. It must be conceded that the facts of that case differ in some material respects from the one we now have under consideration. It very clearly decides, however, that the fact that the plaintiff was not a party to the contract with the defendant, but purchased the article in question from a druggist, who had bought it from another druggist, the vendee of the defendant, did not preclude a recovery. The action was founded on the negligence of the defendants, whose agent had negligently labeled a jar of what was in fact belladonna "1-2 lb. dandelion," etc. By reason of this negligent labeling, the intermediate vendors, as well as the plaintiff, were led to believe that it was the extract of dandelion, which was harmless, and did not know it was belladonna, which was poisonous. The court, on page 409, said: "In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer, but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. • • • The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement." On page 410 it is said: "In Longmeid v. Holliday, 6 Exch. 761, the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract." As the defendant was the cause of the injury to the plaintiff, without any intervening negligence of others, and it was "an act of negligence imminently dangerous to the lives of others," he was very properly held liable, although no fraud was proven or alleged. In Loop v. Litchfield, 42 N. Y. 351, it was held that the vendor of an article of his own manufacture is not liable to one who uses the same, with the consent of the purchaser, for injuries resulting from a defect therein, unless such article is, in its nature, "imminently dangerous." See, also, Losee v. Clute, 51 N. Y. 494. In Davidson v. Nichols, 11 Allen, 514, it was held that the sale of an article in itself harmless, and which only became dangerous by being used in combination with some other article, without knowledge by the vendor that it was to be so used, did not make him liable to the purchaser from the original vendee for an injury sustained by him while using it in combination with the other article, notwithstanding it was different from that which was intended to be sold. The facts of that case did not disclose any duty or obligation which rested on the defendant towards the plaintiff in the sale of the article. The court said: "We know of no duty or principle of law by which a vendor of an article can be held liable for mistakes in the nature or quality of the article, arising from his carelessness and negligence, which cause loss or injury to other persons than his immediate vendee, when there has been no fraudulent or false representation in the sale, and the article sold was in itself harmless; especially, when the sale is made without any notice to the vendor that the article is bought for a third person," etc. In McDonald v. Snelling, 14 Allen, 294, the court said: "When a right or duty is created only by contract, it can only be enforced between the contracting parties. But, when the defendant has violated a duty imposed on him by the common law, it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. An action can be only maintained when there is shown to be—First, a misfeasaece or negligence in some particular as to which there was a duty towards the party injured, or the community generally; and, secondly, when it is apparent that the harm to the person or property of another, which has actually ensued, was reasonably likely to ensue from the act or omissions complained of." In Wellington v. Oil Co., 104 Mass. 64, the court decided that where the defendant sold naphta to a retail dealer to be sold by him to be used in lamps for illuminating purposes,—the defendant knowing it to be explosive and dangerous to life, when so used,—and that the retail dealer's purpose was to sell the same, and the latter sold it to the plaintiff without either of them knowing its dangerous qualities, he was held liable, and was bound to contemplate, as a natural and probable consequence of his unlawful act, that it might explode or ignite, and injure an innocent purchaser, or his property, and must answer in damages for such a consequence, if it should come to pass. It was held in Jeffrey v. Bigelow, 13 Wend. 518, that the sale of animals which had a contagious disease, known to the vendor, but not to the vendee, was a fraud. This is approved of in Cooley on Torts (1st Ed. 481), where it is also said that the fraud would not only be more censurable, but more clearly actionable, if that which is exposed to injury by the concealment is the health or life of human beings. See, also, Wood, Nuis. § 146. Hill v. Balls, 2 Hurl. & N. 299, is in conflict with Jeffrey v. Bigelow, *supra*, so far as holding the concealment of the contagious disease to be a fraud; but it does not go to the extent of deciding that if, in point of fact, there was actual fraud or misrepresentation, the vendor would not be responsible for all consequences which naturally resulted from the fraudulent sale. In the cases of Langridge v. Levy, 2 Mees. & W. 519, 4 Mees. & W. 339, and George v. Skivington, L. R. 5 Exch. 1, the defendants sold the respective articles for the use of the parties injured

knowing that they were to be so used by them and hence they present some different features from the case at bar. Such cases as Winterbottom v. Wright, 10 Mees. & W. 109, and Collis v. Selden, L. R. 3 C. P. 495, are in harmony with Loop v. Litchfield, and Losee v. Clute, above referred to. The defendants in those cases owed no duty to the plaintiffs on account of the respective contracts, and the articles sold and the work done were not of such a character as to be necessarily dangerous to those using them, or being where they were, and hence they were not bound either by contract or by any considerations of public policy or safety. Farrant v. Barns, 11 C. B. (N. S.) 553, is to the same effect as Thomas v. Winchester and McDonald v. Snelling, as it was decided upon the principle that a man who delivered an article which he knows to be dangerous or noxious to another person, without notice of its nature and qualities, is liable for any injury which may likely result, and which does in fact result, therefrom to that person, or any other who is not himself informed. In Heaven v. Pender, 11 Q. B. Div. 503, Cotton, L. J., in delivering the opinion of the majority of the court, and in declining to concur in all the principles enunciated by the master of the rolls, said: "I no way intimate any doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who, without due warning, supplies to others, for use, an instrument or thing which, to his knowledge, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to such an instrument or thing, is liable for injury caused to others by reason of his negligent acts."

The appellee has cited Benjamin on Sales (Ed. 1888); Barry v. Croskey, 2 Johns. & H. 17; and other authorities,—to establish the principle that a false representation made by one person to another, upon which a third person acts, and, so acting, is injured, does not give such third person a right of action, unless such false representation was made with the intent that it should be acted upon by him in the manner that occasions the injury or loss. That may be a correct doctrine, as far as it goes, as established by the English courts; but we do not understand it to be the law as settled by the courts of this country, unless it be taken with the further qualification that if the act done violate a duty owed to the particular person injured, or to the public, the defendant will be liable to a third person. We are not prepared to announce, as the law of this State, that a vendor can, by means of false representations as to the character and condition of the thing sold, induce his vendee to purchase it from him, thereby causing him innocently to subject a third person to the injury which naturally comes from his coming in contact with the thing purchased, and still, in all cases, excuse liability to such third person unless the latter can establish that such false representations were made with the direct intent of their being acted on by him in the manner that occasions the injury.

We have referred to a number of cases which present various phases of such questions as may reflect upon the one before us. Without deeming it necessary to pass upon all of them, or to go to the full extent that Thomas v. Winchester has gone, we are of the opinion that the authorities, and a proper regard for the protection of innocent persons, fully justify us in the conclusion that if a vendor sells any property which he knows to be imminently dangerous to human beings, and likely to cause them injury, to an innocent vendee, who is not aware of the danger, and to whom false representations have been made as an inducement to the sale, he may, under proper allegation and proof, be held responsible, not only to the vendee, but to such person or persons as the vendee may, in the ordinary course of events, call upon to take charge of the property for him.

NEGOTIABLE INSTRUMENT—BONA FIDE PURCHASER—ESTOPPEL.—The Supreme Court of Alabama hold in Brown v. First National Bank, 15 South. Rep. 435, that the maker of a note payable at Tuscaloosa Fence Factory is estopped in a suit thereon by an innocent purchaser for value to deny the existence of such a place. Haralson, J., after stating the law as to the rights of a *bona fide* purchaser of negotiable paper for value before maturity, says:

The point is urged, however,—the decision of which admits, or excludes the other defenses set up, that it was competent for the defendant to show by parol proof, that there was, in fact, no such place as the Tuscalooso Fence Factory, the one referred to in the note as its place of payment. The precise question has been twice before the Indiana court, the first time, in the case of Hall v. Harris, 16 Ind. 180, where it was held that a note made payable "at the Piqua Branch Bank of Ohio," shows on its face that it was made in Ohio, and that the maker was estopped by his note, to deny the existence, at its date, of the State Bank of Ohio. The second time, it arose in the case of Parkson v. Finch, 45 Ind. 122, where the court say: "The real question for our decision is, whether a person who signs a note purporting to be negotiable and payable in a bank of this State, is thereby, estopped in an action brought by a *bona fide* purchaser for value and before maturity, from asserting and proving that there was no such bank as the one described in the note. It is provided by the sixth section of an act concerning promissory notes, bills of exchange, etc. (appearing as section 5506 of the Code of that State), "that notes payable to order, or bearer in a bank in this State shall be negotiable as inland bills of exchange, and the payees and indorsers thereof may recover, as in case of such bills." We think it is obvious from the plain and unambiguous language of the statute, and from the numerous decisions of this court placing a construction upon the above section, that the common law privileges of negotiable notes are confined, in this State, to such notes as are drawn payable at or in a bank in this State, and that this presupposes that the bank in or at which the paper is payable, shall have an actual existence, at the time the note is executed." By section 5503 of the Code of that State, it is provided, in respect to negotiable instruments, that "whatever defense or sets-off the maker of any such instrument had, before notice of assignment against an assignor, or against the original payee, he shall have also against the assignees." In Glidden v. Henry, 104 Ind. 279, 1 N. E. Rep. 369, it is said, that "the sole purpose of the section (5506) was to put a limitation upon section 5503, and provide for commercial paper that might circulate free from defenses, in favor of the maker. This is accomplished by the provision, that if the note be payable at a bank in this State, it shall be negotiable as an inland bill of exchange." It is obvious, then, without section 5506 of their Code, that what is gen-

erally termed, "*bona fide* holders for value," of such paper in that State, acquired no privileges against defenses which the maker had against the assignor or original payee thereof, and that section 5506 protected such purchasers, against section 5503, when the instruments were payable at a bank in that State. If payable elsewhere, this privilege was not accorded. Our Code on the same subject provides (section 1756): "Promissory notes payable in money at a bank or private banking house, or a certain place of payment therein designated, and bills of exchange are governed by the commercial law," and these are not subject to payments, set-offs, and discounts, had or possessed against the same, previous to notice of the assessment or transfer. Code, §§ 1765, 2684. The difference between the statutes in the two States is striking. There, paper to be available against secret defenses in the hands of *bona fide* purchasers, must be payable at one class of places, of all the others,—that of banks in the State; whereas, here, to give it such protection, it may be made payable at any certain, designated place in the State, whether in the towns or cities or country, and these are without number. If there were reasons, for holding as the Indiana court did, that the existence of the bank could generally be ascertained, and if it cannot be, the purchaser takes the paper at his peril,—which doctrine we do not approve,—they fail here, where there is no limit to the places at which such paper may be made payable.

We rest the case, however, on the broad principle that the acts of the maker and payees of the note vitalized and gave it credit, invited and induced the plaintiff to purchase it, and it is true conservatism and sound policy, promotive of right and equity, to seal their lips against contradiction and denial of that which they must be taken to have affirmed, to the injury of the plaintiff who trusted the affirmation. Bibb v. Hall (Ala.), 14 South. Rep. 103; Snider's Sons' Co. v. Troy, 91 Ala. 224, 8 South. Rep. 658; Central A. M. Ass'n v Alabama, G. L. Ins. Co., 70 Ala. 120; Bank v. Dunkin, 54 Ala. 471, and authorities above.

INJURIES SUSTAINED IN WRONG-DOING.

It is the purpose of this article to discuss the rights of persons sustaining injuries while transgressing the law. Any injury caused by the negligence or fault of another is *prima facie* actionable. Conduct that will preclude a party thus injured from a recovery in damages "cannot in any case be less than: 1st, a willful and intentional act of wrong. 2d, a voluntary assumption of the risk which results in the injury. 3d, negligence."[1] Only the first branch of this rule is within the scope of this paper. That willful or intentional act which puts an injured person in the wrong and precludes recovery, may consist: 1st. In the commission of a penal offense. 2d. In the commission of a tort. 3d. In the transaction of business forbidden by law. Under the first head will be considered, for convenience, those offenses which do not also include a tort.

Injuries Sustained in the Commission of a Penal Offense.—It will doubtless conceded that one injured by the negligence of a partner in crime as an incident to the carrying out of some criminal undertaking is without redress.[2] The question of liability where the negligent party is wholly blameless, except for his negligence, and the injured party has only been guilty of an intentional breach of law, is one that involves many nice distinctions and much difference of opinion. Th s question has often arisen in suits for injuries received from defective highways while traveling on Sunday. Sunday work and travel except in case of necessity or charity are generally prohibited by law. As to whether a concurrent violation of this law precludes recovery for injuries received there is an irreconcilable conflict of authority. The Supreme Court of Massachusetts has adopted the extreme rule that one injured through the negligence of the highway authorities while traveling on Sunday, except in a case of necessity or charity, is without remedy. This is placed on the ground that the disregard of the requirements of the statute by the plaintiff constitutes a species of negligence or want of due care which is fatal to the action.[3] On the same theory it is held in Stanton v. Metropolitan R. R. Co.,[4] that a passenger traveling on a street car on Sunday in violation of the law cannot recover for injuries received through the company's negligence. In Day v. Highland St. Ry. Co.,[5] it is held that a street car conductor injured in the service on Sunday cannot recover. In Read v. Boston & A. R. Co.,[6] it is held that an employee of a railroad train injured in like manner cannot recover. In McGrath v. Merwin,[7] it was held that plaintiff could not recover for injuries received from the negligence of defendants while assisting gratuitously in clearing out defendants' wheel-pit at their request. This rule is now modified in

[1] 2 Thompson on Negligence, 154.

[2] Martin v. Wallace, 40 Ga. 52.

[3] Jones v. Andover, 10 Allen, 18; Bosworth v. Swansey, 10 Met. 363; Davis v. Somerville, 128 Mass. 594; Connolly v. Boston, 117 Mass. 64.

[4] 14 Allen, 485 and cases cited.

[5] 135 Mass. 113.

[6] 140 Mass. 199.

[7] 112 Mass. 467.

Massachusetts by statute.[8] The same rule obtains in Maine.[9] In Johnson v. Irasburgh,[10] the Supreme Court of Vermont virtually repudiates the reasoning of the Massachusetts court, but reaches the same result on the theory that the town is liable for such injuries only by force of statute and that the statute cannot be construed to impose that liability in favor of persons traveling at a time or in a manner forbidden by another statute. The doctrine of the foregoing cases is vigorously combatted by the courts of nearly every other State wherever passed upon.[11] The theory of this line of cases is that the infraction of the law is a mere breach of duty toward the State, not involving any breach of duty to the defendant, and hence is simply an irrelavent fact. That any violation of the law to bar recovery must be the proximate cause of the injury and that proximity in point of time is no part of the definition of proximate cause.[12] The doctrine of these cases and the reason therefor are clearly stated by Dixon, C. J., in Sutton v. Wauwatosa, *supra*. Plaintiff was driving cattle to market on Sunday in violation of the law. They were injured by the breaking down of a defective bridge which the defendant town was bound to keep in good repair. Judgment for defendant was reversed. It is there said: "The fault or want of due care, or negligence on the part of the plaintiff which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it. * * * Time and place are circumstances necessary in order that any event may happen or transpire, but they are not ordinarily, if they ever are, circumstances of cause in transactions of this nature. * * * Connection, therefore, merely in point of time, between the unlawful act or fault of the plaintiff and the wrong or omission of the defendant, the same being in other respects distinct or independent acts or events, does not suffice to establish contributory negligence or to defeat the plaintiff's action on that ground." In Mohney v. Cook,[13] the Supreme Court of Pennsylvania attempts to reconcile its decision with the Massachusetts cases, by suggesting that a different rule of liability may exist when the State or a subdivision thereof is defendant, from that existing when an individual is defendant; but a glance at the Massachusetts cases above cited will show that no such distinction is there recognized, nor have we found it elsewhere suggested. Cases of injuries received while violating Sunday laws are not exceptional. It is generally held in other cases that the fact that a party was violating the law will not bar recovery unless such violation was a contributory cause of the injury. And here the Massachusetts court falls into line and it is there as elsewhere held that such violation of the law concurring with the injury does not necessarily defeat recovery. As where a traveler is injured while traveling on the wrong side of the road in violation of the statute,[14] or while standing his wagon in the middle of a crowded street in violation of a city ordinance,[15] or while stationing his wagon transversely to the street while unloading goods, in violation of an ordinance;[16] or while driving faster than six miles an hour contrary to an ordinance.[17] And in Hall v. Corcoran,[18] it was held, overruling a former decision of the same court,[19] that the owner of a horse who let it on Sunday to be driven to a particular place, can maintain an action for tort against the hirer for driving it to a different place, and, in doing so, injuring it. Now while the doctrine of Jones v. Andover[20] has been repeatedly reaffirmed and never doubted in that

[8] Statute of 1877, ch. 232; Statute of 1884, ch. 37.

[9] Cratty v. Bangor, 57 Me. 423.

[10] 47 Vt. 28. See, also, Holcombe v. Danby, 51 Vt. 428.

[11] Sutton v. Wauwatosa, 29 Wis. 21; Philadelphia, etc. R. R. Co. v. Phil., etc. Towboat Co., 23 Howard (U. S.), 209; Mohney v. Cook, 26 Pa. St. 342; Carroll v. Staten I. R. R. Co., 58 N. Y. 126; Sewell v. Webster, 59 N. H. 586, and cases cited; Johnson v. Mo. Pac. R. R. Co., 18 Neb. 690; Louisville N. A. R. R. Co. v. Frawley, 110 Ind. 18; Opsahl v. Judd, 30 Minn. 126, and cases cited: Knowlton v. Mil. City Ry. Co., 59 Wis. 278, and cases cited; McArthur v. G. B. & M. Canal Co., 34 Wis. 139; Platz v. Cohoes, 89 N. Y. 219; Baldwin v. Barney, 12 R. I. 392.

[12] 1 Shearman & R. on Negligence, Sec. 26.

[13] 26 Pa. St. 342.

[14] Damon v. Scituate, 119 Mass. 66; O'Malley v. Dorn, 7 Wis. 236; Norris v. Litchfield, 35 N. H. 271 (leading case.)

[15] Neanow v. Uttech, 46 Wis. 581. See cases cited.

[16] Steele v. Burkhardt, 104 Mass. 59. See Newcomb v. Boston Protective Dept., 146 Mass. 596, 16 N. E. Rep. 555.

[17] Baker v. Portland, 58 Me. 199; Hall v. Ripley, 119 Mass. 135.

[18] 107 Mass. 251. See cases cited.

[19] Gregg v. Wyman, 4 Cush. 322.

[20] 10 Allen, 18, *supra*.

State, between this doctrine and the Massachusetts cases just cited there is a conflict hard to reconcile. This conflict is not so much in the principle as in the application; for the principle laid down in all of these cases is the same, viz: That to preclude recovery for injury received by the fault of another, the plaintiff must have been guilty of some contributory fault or negligence. But in the application of this principle the position of the Massachusetts court amounts to this: A concurring violation of the Sunday law is in itself such a contributory cause while the violation of any other law is not. The rule of contributory negligence is the true rule applicable to all such cases. Plaintiff's violation of the law in order to affect his case must, like any other act, "be a proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action."[21]

Injuries Sustained in the Commission of a Tort.—This brings us to the second branch of the subject. The rights of a party injured while committing a tort. A tort or trespass is usually in the eye of the law, contributory to an injury received from the mere negligence of the party whose person or property is trespassed upon. It was accordingly held in McCarthy v. Portland,[22] that one suffering injury from a defective highway while using it for an illegal horse race must be denied redress in that the city was bound to keep the highway in repair only for travelers. So where one is injured while using a highway for any unauthorized purpose though not in itself unlawful, as for purposes of play,[23] or while carelessly engaged in conversation on the street leans on a railing and is injured by its giving away.[24] The same rule applies to trespassers on private premises. "The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers."[25] In Ratte v. Dawson,[26] a child playing in or near an excavation on an unfenced vacant lot was killed by falling earth from an overhanging embankment. Held a trespasser and not entitled to recover. In Hargreaves v. Deacon,[27] a child wandered upon defendant's premises and fell into an uncovered cistern. Held, defendant was not liable. In Kohn v. Lovett,[28] plaintiff fell into an excavation while running across a lot to aid in extinguishing a fire. Recovery was denied. The same rule applies to trespassing animals. The owner of unenclosed woodland is not liable for an injury sustained by trespassing cattle pasturing thereon, from falling into a hole dug by him within the bounds of his land left unenclosed,[29] nor for the death of a trespassing cow from drinking maple syrup carelessly left exposed.[30] This rule is subject to some modification. Thus a child is excused from trespassing where the danger is such as to naturally attract the curiosity of children. The proprietor of a paper mill left two cog-wheels geared and constantly in motion near the ground and near the street and a child attracted by natural curiosity had his fingers crushed between the wheels. A verdict for defendant was reversed as against the evidence.[31] This rule has been frequently applied to cases where children were injured while playing with turntables carelessly left exposed.[32] There is another apparent modification of this rule in the case of travelers injured by falling into excavations near a highway. But the excavation must be so near as to be substantially adjoining the way. The true test is, was the traveler a trespasser before falling in; if so he has no remedy.[33] But the mere fact of being a tort-feasor will not in all cases place a person beyond remedy for injuries received. Two

[21] 1 Shearman & Redfield on Negligence, Sec. 94.

[22] 67 Me. 167.

[23] Blodgett v. Boston, 8 Allen, 237, and cases cited.

[24] Stickney v. Salem, 3 Allen, 374; Stinson v. Gardner, 42 Me. 248; Beach on Contributory Negligence, Sec. 256.

[25] 1 Thompson on Negligence, 303 and cases cited; McDonald v. Union Pac. Ry. Co., 35 Fed. Rep. 38; Stone v. Jackson, 32 Eng. L. & Eq. 349; Rodgers v. Lees, 140 Pa. St. 475; Woods v. Lloyd (Penn.), 16 Atl. Rep. 43; Hargreaves v. Deacon, 25 Mich. 1; Ratte v. Dawson, 50 Minn. 450.

[26] 50 Minn. 450.

[27] 25 Mich. 1.

[28] 44 Ga. 251.

[29] Knight v. Abert, 6 Barr (Pa.), 472.

[30] Bush v. Brainerd, 1 Cowen, 78. See, also, Hess v. Lupton, 7 Ohio, 216.

[31] Wherley v. Whiteman, 1 Head (Tenn.), 610. See, also, Powers v. Harlow, 53 Mich. 507; Harriman v. Pittsburg, C. & St. L. R. Co., 45 Ohio St. 11.

[32] Barrett v. Sioux Pac. R. R. Co., 91 Cal. 296, and cases cited; Keffe v. Mil. & St. P. Ry. Co., 21 Minn. 207; Nagel v. Mo. P. Ry. Co., 75. Mo. 653; Railroad Co. v. Stout, 17 Wall. 657; Ilwaco Ry. & Nav. Co. v. Hedrick, 1 Wash. St. 446.

[33] Hadley v. Taylor, L. R. C. P. 53; Sanders v. Reister, 1 Dak. 151, and cases cited. And Hardcastle v. R. R. Co., 4 Hurl. & N. 67, where the subject is ably discussed but under the particular circumstances of the case, relief was denied.

limitations upon this rule are to be noted: (1) Although the commission of a trespass is a species of negligence, as in case of any other unlawful act, to preclude recovery it must be the proximate cause of the injury. But if after discovering the exposed situation of the trespasser the owner fails to employ ordinary care to avoid inflicting an injury, he is liable.[34] Thus cattle straying on a railroad track,[35] and a child lying asleep on the track[36] are trespassers, but if due care is not used to avoid injury the railroad company is nevertheless liable. (2) By a positive, deliberate or malicious act not neceseary for the protection of person or property a party may render himself liable to a mere trespasser. Thus if one set a bait of stinking meat, for the purpose of attracting animals, so near plaintiff's premises that his dogs might scent it without becoming trespassers, and a valuable dog of plaintiff's is entrapped thereby, though the animal was trespassing his owner may recover damages.[37] Nor is it necessary that the bait be such as to attract animals from a distance. In Johnson v. Patterson,[38] defendant scattered poisoned meal by which plaintiff's fowls were poisoned while trespassing. Plaintiff recovered although he had been notified of the measure to which defendant intended resorting. Much more reason is there for applying this rule to persons trespassing. In Meibus v. Dodge,[39] a child of seven was bitten by a ferocious watch-dog of defendant's while committing a trivial trespass on defendant's sleigh. He recovered damages. A person is not at liberty to set spring guns or other engines endangering human safety for the purpose of repelling an ordinary trespass.[40] It matters not that the injury is not inflicted in repelling the trespass. A man gored by a vicious stag of defendant's while crossing defendant's pasture,[41] a woman bitten while picking berries in an old field of defendant's[42] by his vicious dog running at large, are not barred by the fact of being trespassers. The commission of a personal tort or trespass does not excuse the commission of any act not necessary to repel it. For any excess of force damages may be recovered.[43]

Injuries Sustained in the Negotiation of Unlawful Business.—We now come to the third branch of this subject: The rights of parties who suffer injury in the negotiation of unlawful business. This injury is usually the result of fraud. It is a clear proposition that a party, who has, without being overreached, paid money on an illegal contract, cannot, by alleging illegality rescind the contract and recover his money. The parties being in equal wrong, both are remediless.[44] But when the element of fraud enters into the transaction the question involves more difficulty. Courts have been reluctant to refuse relief in such cases. But public policy demands that illegal transactions should be discouraged, and where relief cannot be afforded without affirming or recognizing the validity of the unlawful transaction, the law leaves the injured party where his own fault has placed him. The following, then, is the rule collected from the cases; if the plaintiff, to make out his case, must lay his foundation in the illegal transaction; if he cannot open his case without showing the unlawful transaction, a court will not assist him.[45] Fraud or deceit by which a person is induced to enter into an unlawful contract is usually a transaction of this nature. The case of Northup v. Foot, *supra*, affords a good illustration of this rule. Plaintiff was defrauded in the sale of a horse on Sunday. Relief was denied. See also cases cited below.[46] Kitchen v. Greenabaum, was an action for fraud in the sale of a lottery ticket. Relief was denied. This rule may work hardship in individual cases. It permits a defendant equally in fault with the plaintiff to profit by his own fraud and denies the plaintiff a remedy for the injury. But it is not for the benefit of such plaintiffs that the rule is made. The public good demands that illegal transactions

[34] Brown v. Lynn, 31 Pa. St. 510.
[35] Isbell v. N. Y. & N. H. R. R. Co., 27 Conn. 393, and cases cited; Curry v. C. & N. W. Ry. Co., 43 Wis. 665.
[36] Meeks v. So. Pac. R. R. Co., 56 Cal. 513.
[37] Townsend v. Wathen, 9 East, 277.
[38] 14 Conn. 1.
[39] 38 Wis. 300. See, also, Loomis v. Terry, 17 Wend. 496.
[40] Hooker v. Miller, 37 Iowa, 613.
[41] Marble v. Ross, 124 Mass. 44.
[42] Sherfey v. Bartley, 4 Sneed (Tenn.), 58.
[43] Ogden v. Claycomb, 52 Ill. 365; Trogden v. Henn, 85 Ill. 237.
[44] Clark v. Lincoln Lumber Co., 59 Wis. 655.
[45] Thomas v. Brady, 10 Pa. St. 170; Northrup v. Foot, 14 Wend. 248.
[46] Robeson v. French, 12 Metc. 24; Gunderson v. Richardson, 56 Iowa, 56; Kitchen v. Greenabaum, 61 Mo. 110.

be discouraged. But where the fraud and the illegal transaction are separable, as where the fraud is subsequent, an action will lie. The case of N. W. Life Ins. Co. v. Elliott,[47] is illustrative of this distinction. Defendant was the beneficiary of an insurance policy, issued by plaintiff, a Wisconsin corporation, in the State of Oregon, where it was prohibited by the laws of the latter State from doing business, and the contract of insurance was therefore illegal and void. By false representations that the insured was dead he obtained the insurance money. An action to recover the money so paid was sustained, the court holding that the action was not an affirmance of the contract, and that although the plaintiff was not authorized to do business in that State this fact did not license the defendant to rob or defraud it under pretense of doing business with it. In distinction from Kitchen v. Greenabaum,[48] cited above, is Catts v. Phelan.[49] There the holder of a lottery ticket by manipulation and fraud caused it to be drawn as a prize and received the prize money. This action was brought by the lottery contractor to recover back the money so paid. Baldwin, J., in delivering the opinion of the court, said: "The transaction between the parties did not originate in the drawing of an illegal lottery. The contract which the law raises between them is not founded on the drawing of a lottery but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. To state is to decide such a case." In Clemens v. Clemens,[50] plaintiff was allowed to recover land included by mistake, or through defendant's fraud, in a conveyance fraudulent against creditors. The true rule applicable in all such cases is clearly laid down in this case. "To the extent of his intended wrong the plaintiff might be without remedy; but in all other respects his rights and remedies are the same as if no such wrong had been done or intended. This is and should be the true measure of all just punishment. Though guilty of a wrong or transgression of the law in one particular a party does not become an outlaw, or forfeit his legal right to protection in all others nor lay himself open to the frauds and machinations of others to be practiced and perpetrated upon him with impunity." And this suggests the general rule applicable to all cases of injuries sustained in wrong-doing. "The fact that the party injured was at the time doing wrong does not put him out of the protection of the law. He is never put by the law at the mercy of others."[51] As the Supreme Court of Pennsylvania, per Mercur, J., aptly said in Holt v. Green.[52] The prohibition amounts simply to this: "That the law will not lend its support to a claim founded on its own violation." These quotations tersely embody the whole law on this subject.

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[47] 5 Fed. Rep. 225.
[48] 61 Mo. 110.
[49] 21 Howard, 376.
[50] 28 Wis. 637, and cases cited.
[51] Cooley on Torts, 157.
[52] 73 Pa. St. 198.

ELEVATED RAILROADS ON STREETS—TAKING PRIVATE PROPERTY — INJUNCTION—PUBLIC NUISANCE.

GARRETT V. LAKE ROLAND EL. RY. CO.

Court of Appeals of Maryland, June 19, 1894.

1. The building of abutments, to be used as the approach for elevated railway tracks in the center of the street, is not a taking of the property of abutting landowners, within the meaning of Const. art. 3, § 40, which prohibits the "taking" of private property for a public use without compensation being "first" paid or tendered, so as to entitle the landowners to enjoin the erection of the same until compensation is paid for the injury.

2. The erection of an abutment in a street, to be used as an approach for elevated railway tracks, by a corporation authorized to do so by a city ordinance, is not a public nuisance.

MCSHERRY, J.: This case was argued during the last October term, and then, by direction of the court, it was reargued at the present April term. Upon both occasions the discussions at the bar displayed great research and signal ability, and the briefs show unusual care, skill, and thoroughness in their preparation. After several consultations a majority of us have reached the conclusions which, having first briefly stated the material facts, we will proceed to announce.

The appeal is from a decree dismissing the appellant's bill of complaint filed by him in the Circuit Court of Baltimore city against the Lake Roland Elevated Railroad Company. The record shows that Mr. Garrett is the owner of certain unimproved lots situated on and bounded by the west side of North street, and fronting 436 feet thereon, and lying between the north side of Eager street, and the south side of Chase street,

in Baltimore city. He also owns other lots, likewise fronting on the west side of North street, between Chase and Biddle streets, but with these we are not now concerned. North street is 60 feet wide between the building lines, and 36 feet between the curbs, and no part of it is included within the outlines of Mr. Garrett's deed. By section 5 of Ordinance No. 23, approved April 8, 1891, the North Avenue Railroad Company (one of the several roads, by the consolidation of which the Lake Roland Elevated Railway Company was formed) was authorized to bridge the Northern Central Railway Company's tracks on North street, by means of an elevated structure, extending, including the necessary approaches thereto, along North street from the corner of that and Eager streets to the corner of North and Saratoga streets. A stone abutment, forming an inclined plane, to carry on its perpendicular or highest side the iron superstructure, and to serve, on its surface, as the northern approach to the elevated road, has been erected nearly in the center of North street, between Chase and Eager, directly in front of part of the first-named lots of Mr. Garrett. It is 83 feet and 2 1-2 inches in length, and 15 8-10 feet in width, and starts at the street grade, and gradually rises to a height of 9 feet, and leaving a distance or driveway between its western face and the curb line, contiguous to Mr. Garrett's property, of 9 feet and 8 1-4 inches. It is alleged that the construction of this abutment of solid masonary in the bed of North street, and the elevated structure, will, by reducing the width of the street in front of the appellant's lots to less than 10 feet, destroy the access to his property from North street, and prevent him from reaching the same with vehicles ordinarily used in Baltimore. It is charged that the destruction of his right of access to his property as aforesaid renders such property entirely unsalable, and deprives him of the market value thereof, and constitutes, in fact and in law, a taking of his property without making compensation therefor as required by the constitution of the State of Maryland. It is further claimed that this structure deprives the premises of light and air, and that this, too, is a taking of the property, within the prohibition of the constitution. It is averred that the mayor and city council of Baltimore, and the general assembly of the State, had no power to authorize the construction of the said abutment, or to permit the operation of the road thereon, because these acts create a new and additional servitude upon the street, and upon the appellant, as an abutter thereon, and are a nuisance. It is likewise insisted that Ordinance No. 23, and the act of assembly of 1892, ch. 112, confirming that ordinance, are in conflict with section 40 of article 3 of the constitution, and void. The bill prays for an injunction to restrain the completion of the abutment, and a mandatory injunction requiring the appellee to demolish and remove so much of it as had been built. The appellee answered the bill, and considerable evidence was taken.

The proposition distinctly presented by the record, and earnestly contended for by the appellant's distinguished counsel, is that the erection by the appellee of this abutment on property not owned by the appellant, but in the bed of a public city thoroughfare, upon which his lots abut, destroys the access to his land, interferes with light and air, imposes a new and additional servitude upon his property, and deprives him of the benefit of the use of the same, and amounts in law to a taking of his property that is in fact not trespassed upon or touched,—is illegal, until compensation shall have been first made therefor. Though there has been no physical invasion of the appellant's property, still, if the act complained of constitutes, by reason of its consequences, a taking of the appellant's private property for a public use, within the meaning of section 40 of article 3 of the constitution of Maryland, which prohibits the taking of private property for public use, except upon just compensation being first paid or tendered, then the injunction should have been granted. But if, on the contrary, this was not such a taking as the constitution has reference to, and injury has been done the appellant, then his remedy is in another and a different forum; and the ninth section of the ordinance heretofore alluded to makes ample provision for the prompt and effective enforcement of such judgment as a court of law, in an appropriate proceeding, may pronounce.

That there was no actual appropriation of or entry upon a single foot of the land contained within the outlines of the appellant's deed is admitted, and could not be denied; and therefore, to support the theory of the bill, the consequences which it is asserted will result to the appellant from the occupancy by the railway of contiguous land, forming part of the bed of a highway, and owned by some one else, but subject to an easement in the public, and which consequences are not physical invasions of the plaintiff's soil, nor an ouster of him therefrom, are treated by the appellant as a taking of that which is confessedly neither encroached upon nor used at all. The consequential damages resulting from the act complained of—the incidental injuries to the owner—are thus charged to be a taking of private property for a public use, though the property itself remains unappropriated and unapplied to that use in any way whatever. While the constitution of the State has prohibited the taking of private property for public use without compensation being first paid or tendered, it has not undertaken to define or declare what shall be a taking, within its terms. True, there is some conflict among adjudged cases as to what amounts to such a taking, but the overwhelming weight of authority accords with the conclusions which this court announced in two cases that will be fully referred to later on. Apart from the decisions of the Supreme Court of Ohio (see Crawford v. Delaware, 7 Ohio St. 460), which rests

upon a doctrine peculiar to that State, and the recent New York decisions in the Elevated Railway Cases (Story v. Railroad Co., 90 N. Y. 122; Lahr v. Railway Co., 104 N. Y. 268, 10 N. E. Rep. 528), which are hopelessly in conflict with the principles announced in other cases in the same State (Radcliff v. Mayor, etc., 4 N. Y. 195; Fobes v. Railroad Co., 121 N. Y. 505, 24 N. E. Rep. 919), and the decisions in Minnesota (Adams v. Railroad Co., 39 Minn. 286, 39 N. W. Rep. 629; Lamm v. Railroad Co., 47 N. W. Rep. 455), and a few cases in Mississippi (Theobold v. Railway Co., 66 Miss. 279, 6 South. Rep. 230), and possibly one or two other States,—all substantially following the New York Elevated Railway Cases,—there is practically an unbroken current of adjudged cases broadly and clearly marking and defining the difference between an incidental injury to, and an actual taking of, private property. An injury to and a taking of such property are distinct things. Every taking involves an injury of some kind, though every injury does not include a taking. "Property is taken by an entry upon and appropriation of it, as in the ordinary case of location. It is injured by obstructing access, as in Duncan's Case (5 Atl. Rep. 742), or drainage, as in Ziemer's Case (17 Atl. Rep. 187)." Jones v. Railroad Co. (Pa. Sup.) 25 Atl. Rep. 137. In Northern Transp. Co. v. Chicago, 99 U. S. 635, the court said: "Persons appointed or authorized by law to make or improve a highway are not responsible for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted, alike in England and in this country. Plate Manufacturers v. Meredith, 4 Term R. 794; Sutton v. Clarke, 6 Taunt. 29; Boulton v. Crowther, 2 Barn. & C. 703; Green v. Borough of Reading, 9 Watts, 382; O'Connor v. Pittsburg, 18 Pa. St. 187; Callender v. Marsh, 1 Pick. 418; Smith v. Washington City, 20 How. 135. * * * The decisions to which we have referred were made in view of Magna Charta, and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking, within the meaning of the constitutional provision." And thus was affirmed in Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. Rep. 820. The constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but only indirectly or consequently injured. Railroad Co. v. Larson (Kan.), 19 Pac. Rep. 661; Omaha Horse Ry. Co. v. Cable Tramway Co., 32 Fed. Rep. 727; Heiss v. Railroad Co., 69 Wis. 555, 34 N. W. Rep. 916; Railroad Co. v. Heisel, 38 Mich. 63; Crosby v. Railroad Co., 10 Bush, 289; Dorman v. City of Jacksonville, 12 Fla. 545; Bradley v. Railroad Co., 21 Conn. 308; Spencer v. Railroad Co., 23 W. Va. 407; Richardson v. Railroad Co., 25 Vt. 465; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. Rep. 719.

This distinction between consequential damages and an actual taking thus firmly settled, was frequently severe in its results, particularly when the power of eminent domain had been exercised by municipal corporations; and, with a view of relaxing its rigors to some extent, many of the States of the Union changed their organic law so as to require compensation to be made for incidental injuries, precisely as though there had been a physical taking of the property. Thus the constitution of Pennsylvania, of 1873, and of Alabama, of 1875, provide that, when private property is taken for public use, just compensation shall be made for the property taken, injured or destroyed; that of Arkansas, of 1874, that private property shall not be taken, appropriated, or damaged; that of Illinois, of 1870, West Virginia, of 1872, Missouri of 1875, Colorado and Texas, of 1876, Georgia, of 1877, and California, of 1879, that it shall not be taken or damaged. Selden v. City of Jacksonville (Fla.) 10 South. Rep. 457. Such changes would have been wholly unnecessary if the view of the appellant as to what constitutes a taking of private property had prevailed. But the immunity which protects from liability, governmental agencies, in the proper and skillful performance of their public functions, does not extend to private persons or mere *quasi* public corporations; and therefore, while in both instances the same distinction between an actual taking of private property and consequential injuries to it when not taken is applicable, a private person or a *quasi* public corporation is liable in damages to the individual incidentally injured, though the act complained of, and occasioning the injury, was in itself lawful. Hence, for such injuries as are complained of here, though they do not amount to a taking of property, if found to exist, there is a remedy in a court of law. Railroad Co. v. Reaney, 42 Md. 117. The ninth section of the ordinance authorizing the construction of the abutment and the elevated road expressly provides that, if any judgment recovered against the company for such injuries as are here complained of shall remain unpaid for 60 days, "all the rights" of the company under the ordinance "shall cease and be in abeyance until the judgment shall be paid," and the right to operate the road "shall only be revived after the payment thereof." In the case of Mayor, etc., v. Willison, 50 Md. 148, the distinction between consequential injuries and an actual taking of property was considered; and it was distinctly held that damages done to a water power of a mill by means of an increased flow of water carrying debris into the race, caused by the grading and paving by the city of one of its public streets, was not a taking of property. "Property thus injured is not, in the constitutional sense, taken for public use." *Id.* And again, in O'Brien v. Rail-

road Co., 74 Md. 363, 22 Atl. Rep. 141, the question now before us was directly presented. There the plaintiff was an abutting owner on the east side of Howard street, in Baltimore city, with no freehold or leasehold estate in the bed of the street; and he claimed that by reason of his abutting proprietorship he had such an interest in the streets as to entitle him to compensation, according to the provisions of article 3, § 40, of the constitution, for the injury occasioned him by the act of the railroad company in constructing its road in an open cut on the west side of Howard street, and opposite his property. Because he had not been paid or tendered compensation, he filed a bill in equity praying for an injunction to restrain the construction of the open cut. The precise question for determination was "whether the use of the street by the railroad company in the manner proposed, and under the conditions stated, would be such taking of private property of the plaintiff as is forbidden by the constitution of this State, except upon payment of just compensation first being made," and in the course of the opinion it was said: "But, notwithstanding the railroad company may be liable on common-law principles, the question still remains to be answered, will the cutting and use of the street, as proposed by the railroad company, be the taking of private property, in respect of the rights of the plaintiff, as abutting lot owner, within the meaning of the constitution? As already stated, it is not charged that there will be any invasion of or physical interference with any part of the plaintiff's lot, in the construction of the road. The most that he claims for is that he will be deprived of the full use of the street, as it now exists, and that his property will be depreciated in value by the construction of the road. This, however, is but an injury, to whatever extent it may be suffered, of an incidental or consequential nature. * * * In such case as this, therefore, it would seem to be clear, both upon principle and authority, that there is no such taking of private property for public use as is contemplated by the constitution of the State, and hence there is no ground for any preliminary proceeding by way of condemnation."

We must either adhere to these two decisions in 50 Md. and 74 Md., 22 Atl. Rep.,—strictly in accord, as we have shown them to be, with the decided weight of judicial opinion on this subject, or else, receding from them adopt the Ohio or the New York doctrine. We see no reason for departing from, or for modifying, our former deliberate judgments. The Ohio doctrine is peculiar to that State alone (O'Connor v. Pittsburgh, *supra;* Northern Transp. Co. v. Chicago, *supra*), and is so admitted to be in Crawford v. Delaware, *supra*. The New York doctrine involves this inextricable dilemma, viz.: If the grading of a street by a municipal corporation cuts off all access to a person's house, albeit his property is thereby destroyed and rendered valueless, if it is not taken, in the constitutional sense; but if a railroad company, in lawfully constructing its road, does precisely the same thing that the city did in grading the street, then the abutter's property is taken, though not physically entered upon at all. "The house and lot are the same; the street is the same; the act done are the same; the use for which they are taken is a public use, in each case; and yet the court must hold that there is a taking of property in one case, and not a taking of property in the other." Mr. Cowen's brief in O'Brien's Case, *supra*. The abutment and elevated structure, having been built under legislative authority, are not a nuisance. O'Brien v. Railroad Co., *supra*. "That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes." Northern Transp. Co. v. Chicago, *supra*. "It may be stated, as a general rule, that whatever is authorized by statute, within the scope of legislative powers, is lawful, and therefore cannot be a nuisance." 2 Wood, Ry. Law, 970. The structure is therefore a lawful one. It does not destroy the street, as a street, though it may cause the plaintiff greater inconvenience in gaining access to his lots than he encountered before it was built. But this and the other injuries complained of are purely incidental and consequental, though the appellant is not without a remedy therefor. While it is stated as a general rule that no action will lie by an abutting lot owner—who does not own the fee in the street—for injuries which merely result from the legal and reasonable use of a public street by a railway company, and which leaves his right of egress and ingress reasonably sufficient (Railroad Co. v. Bingham (Tenn.), 11 S. W. Rep. 705), still the statute law of Maryland, and the ordinance to which we have alluded (and the terms of which the appellee has accepted), provide an ample remedy for all such damages as the appellant may be able to show he has sustained. The North Avenue Railway Company (one of the corporations forming the Lake Roland Elevated Railway) was incorporated under article 23 of the Code; and section 169 of that article holds every railroad company laying its tracks upon any public street responsible for "injuries done to private property," lying upon or near to such street, "by such location," and the damages thus occasioned may be recovered by civil action. Section 9 of Ordinance No. 23, already referred to makes the payment of such damages, when judicially ascertained, absolutely certain, or suspends the operation of the road.

Upon a full and most careful consideration of the whole case, we are of opinion that the decree dismissing the bill of complaint was properly passed, and it will therefore be affirmed. Decree affirmed, with costs above and below.

NOTE.—The conclusion of the court in the principal case is antagonized by one of the judges who, in a dissenting opinion, very forcibly presents his views. The abutment, he contends, to the extent of its dimensions, subverts and destroys every possible use for which a street was intended. Admitting this to be

an injury which must be redressed the inquiry is, what remedy has the law declared to be appropriate to such a case? If the ordinance and the ratifying statute cannot exempt the defendant from responsibility for injuries committed, he thinks it must follow as a consequence that it is liable to the same proceedings as any other wrong-doer under similar circumstances. The appropriate remedy for obstructing a right of way is an injunction to remove the obstruction. This, he says, was clearly decided in White v. Flannigan, 1 Md. 525. He calls attention to the rule in equity that an injunction will not be granted "when a trespass is fugitive and temporary, and adequate compensation can be obtained in an action at law." But the rule does not imply that, where a trespasser is destroying the property of another person, equity will refuse to interfere because the value of the property might be recovered in an action at law. Every man is entitled to the use and enjoyment of his property in any lawful manner which suits his wishes and purposes; hence, there is a necessary limitation or explanation of the general rule. An injunction will be issued where the trespass reaches to the substance and value of the estate, and goes to the destruction of it, in the character in which it is enjoyed, or where it would impair the just enjoyment of it in the future. White v. Flannigan, 1 Md. 545; Shipley v. Ritter, 7 Md. 413-415; Story, Eq. Jur. § 928.

In White v. Flannigan, it was said: "We have seen that the complainant is entitled under an implied covenant to a right of way over the forty-five foot street. Any obstruction which denies the exercise and use of this right, works irreparable mischief to the street, as a street. The thing ruined by the obstructions is a street, and, as in the case of the mine, the complainant, on the principle there recognized, has the right to the aid of a court of equity. What he complains of is the destruction of the street. He is entitled to the enjoyment of it as a street. In Corning v. Lowerre, 6 Johns. Ch. 439, a bill was filed for an injunction to restrain the defendant from obstructing Vestry street, in the City of New York, averring that he was building a house upon it, to the great injury of the plaintiffs, as owners of lots on and adjoining that street. Chancellor Kent granted the injunction, saying that it was "a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs." Of course, in the present case, the complainant cannot maintain that the obstruction is a public nuisance, but he is entitled to protection against "a special grievance affecting the enjoyment of his property, and the value of it." In Hart v. Buckner, in the United States Court of Appeals for the fifth circuit, reported in 2 U. S. App. 488, 5 C. C. A. 1, 54 Fed. Rep. 925, the court say: "Owners of lots abutting on and adjacent to a public street of a city, even if not owners of a fee in the street, have the right of access and the right of quiet enjoyment; and such rights are property which may be protected by injunction, when invaded without legal authority." From many other cases illustrating this point, we will select two from the Supreme Court of the United States. In Railroad Co. v. Schurmeier, 7 Wall. 272, the complainant alleged that the railroad company was constructing a railroad track over and along a public street, levee, and landing in front of certain real estate in the City of St. Paul, belonging to him, and that the purpose was to run cars thereon for the transportation of freight and passengers, and that if this purpose should be carried into effect the street, levee, and landing could not be occupied and used for the purposes for which they were constructed, and to which they were dedicated, and that his premises would be rendered useless and valueless. The railroad company denied that Schurmeier was the owner of the fee in the street, and set up title in itself, as grantee of the State of Minnesota. It was shown in evidence, among other things, that the person under whom Schurmeier claimed title had, by certain formal proceedings, dedicated to the public the street, levee, and landing; and it was contended that thereby, under the laws of Minnesota, the entire fee was vested in the State. It was also shown that the City of St. Paul claimed entire control over the said premises, and had established a grade for the same. In reference to the statute which was alleged to vest the fee in the State the court said: "Suppose the construction of that provision, as assumed by the respondents, is correct. It is no defense to the suit, because it is nevertheless true that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the acts of the party in making the dedication. They could not nor could the State, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant." It was decreed that the railroad company should be enjoined from the further prosecution of its work, and that it should remove from the street, levee, and landing in front of Schurmeier's premises all tracks, trestle-works, buildings, and obstructions of every kind which it had constructed for railroad purposes. In Barney v. Keokuk, 94 U. S. 324, it appeared among other things, that a railroad company had erected in Water street, in the City of Keokuk, a permanent and substantial building, and that it covered the whole of the front of plaintiff's lots binding on the street. The Circuit Court decided that the railroad company had acquired from the municipal authorities a right to lay down their tracks in the street, but the assent of the municipality could not confer the right to erect this building in the street. The Supreme Court said: "The construction of a permanent freight depot in Water street was an unauthorized and improper occupation of that street. It was a total obstruction of the passage; and this, as we have said, cannot be created or allowed. It is subversive of, and totally repugnant to, the dedication of the street, as well as to the rights of the public."

BOOK REVIEWS.

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To the few who are not already familiar with this excellent series of reports, we will state that, as their name indicates, they are reports of the current cases of greatest value to the judge or practicing lawyer promptly reported and supplemented by exhaustive annotations upon the doctrines in hand. The selection of cases for publication is evidently done with the care and thoroughness which the character of the decisions demand, and the annotations both in quantity and kind are beyond criticism. The special feature, characteristic of this series, is to hold the notes to specific points, to avoid loose collection of authorities on general subjects, which often entails upon the practitioner useless labor. We are constantly making use of this series of reports in a practical manner, and do not

hesitate to commend them to the profession as in every way deserving. Published by The Lawyers' Co-Operative Publishing Co. Rochester, N. Y.

RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS.

The contents of this neat volume of some two hundred pages recently appeared as a series of articles in the *American Law Register and Review*. The branch of constitutional law treated of owes its origin, as the preface says, "to a widespread lack of confidence on the part of the people of the several States of the Union." This lack of confidence as was pointed out in a recent editorial in this journal (39 Cent. L. J. 255) takes shape in the enactment of organic restrictions, some wise and others unwise, upon the power of legislatures. This little book deals with the legal questions surrounding these various restrictions. It is well written and exhibits care and research in the presentation of authorities. Published by Kay & Brother. Philadelphia.

HUMORS OF THE LAW.

A LEGAL CAREER.

He went into an office with intent to study law,
And he waxed enthusiastic over all he read or saw.
It was such a noble science, and that he should come to be
Its most sapient exponent, seemed his certain destiny.

So the office seemed a palace, and a throne the office stool,
While no labor howe'er mighty could this youngster's ardor cool;
For his head was full of visions as a hive is full of bees—
Visions of his future clients and the fatness of their fees.

"Blackstone" was his favored diet, with a dessert dish of "Kent,"
And he served up bits of "Greenleaf" every single place he went;
While he always took some "Wharton" with his quiet ev'ning smoke,
And he warmed his legal body with a glowing piece of "Coke."

Then he went to be examined and his grade was passing fine;
They admitted him to practice and he pasted up his sign,
And the business men remarked, "Oh he is promising, they say,"
But they gave their work to Codger—who was old—across the way.—*Green Bag.*

Recently a woman was on trial before a police court, in Charlotte, N. C. She had figured as a defendant before. Knowing that fact, her counsel on this occasion, who was proving an *alibi* for her, took occasion to put on an unusual number of witnesses, and some of them of undoubted character. So confident was he that, when through the examination, he refrained from making any speech, saying to the court that the witnesses for the defendants were such as to render it unnecessary. The police justice promptly entered up sentence. Observing the astonished looks of her lawyer, he politely said, "Mr. B—,your client has been before me several times. If I were to believe her witnesses, I never would convict her."—*Green Bag.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNTING BY GUARDIAN.—Where a guardian who has a dower interest in his ward's land does not have his dower assigned, he is not entitled to credit himself in his accounts as guardian with one third of the rent of such land.—RAWSON V. CORBETT, Ill., 37 N. E. Rep. 994.

2. ACTION AGAINST STATE—Subsistence Furnished.—In an action against the State to recover for subsistence furnished for men and horses, alleged to have been called into service by the governor to assist in suppressing insurrection and repelling invasion, a complaint is defective which alleges that the governor caused "to be enlisted, enrolled, and mustered into the military service of the State a large number of soldiers, cavalry, rangers, and scouts," to which such subsistence was furnished, without showing that there was no adequate and available militia already enrolled and organized as provided by law.—STANTON V. STATE, S. Dak., 59 N. W. Rep. 738.

3. ADMINISTRATORS — Sale of Realty—Mortgage.—The statute provides that, if the personalty fail to pay the debts of the deceased, "his executor or administrator shall present a petition," etc. C presented a petition, describing himself as "one of the administrators." The order of sale recited, "Now, at this day comes C and E, administrators," and directed them to sell the land. C made report that he had sold it, and the sale was approved, "the administrators" being ordered to make a deed to the purchasers, which they did: Held, that there was no irregularity available for collateral attack.—STOWN V. BANKS, Mo., 27 S. W. Rep. 347.

4. AGREEMENT TO PROCURE INSURANCE.—When a complaint states that plaintiff was at the time he procured defendant to effect certain insurance, and now is, the owner of the property destroyed by fire, and the evidence admitted without objection conclusively shows that plaintiff owned the property at the time the loss occurred, an objection, made for the first time in this court, that such complaint does not state facts sufficient to constitute a cause of action, in that it fails

to allege that plaintiff owned the property at the time of its destruction, is not available.—LINDSAY V. PETTIGREW, S. Dak., 59 N. W. Rep. 726.

5. APPEAL—Joint Assignment of Errors.—A joint assignment of error in a petition in error made by two or more persons which is not good as to all who joined therein will be overruled as to all.—GORDON V. LITTLE, Neb., 59 N. W. Rep. 783.

6. APPEAL — Reversal — Judgment.—When a cause is reversed and remanded, with directions to modify the judgment in a certain specified manner, the court below has no discretion to reopen the judgment in order to adjudicate rights of the parties accrued pending the appeal.—YOUNG V. THRASHER, Mo., 27 S. W. Rep. 326.

7. APPEAL — Record.—Where no question of law is presented by the record, a certificate by the Appellate Court that the case involves questions of law of such importance that they should be passed on by the Supreme Court does not present any questions of law to be determined.—COMMERCIAL NAT. BANK V. CANNIFF, Ill., 37 N. E. Rep. 898.

8. APPEAL — Writ of Error — Parties.—A corporation that is not a party to a suit, and that is not shown by the record to have any interest therein, cannot sue out a writ of error to reverse a judgment rendered in such suit on a mere suggestion that a corporation that was a party to the suit has become merged in the corporation that attempts to sue out the writ.—LOUISVILLE, E. & ST. L. CONSOLIDATED R. CO. V. SURWALD, Ill., 37 N. E. Rep. 909.

9. APPELLATE PROCEDURE — Supreme Court.—The Supreme Court has no jurisdiction of an appeal from the Circuit Court in proceedings for *mandamus* to a mayor to annul permits to fruit sellers to occupy space in the streets, in violation of an ordinance, the amount in controversy being less than $2,500, and no constitutional, federal, nor political question nor State officer being involved. Const. art. 6, § 12.—STATE V. NOONAN, Mo., 27 S. W. Rep. 329.

10 ASSUMPSIT BY ASSIGNEE.—A declaration in *assumpsit* for goods sold and delivered, alleging a promise to the vendor, and an assignment by him to plaintiff, need not allege a promise to plaintiff, as 2 How. Ann. St. § 7344, authorizes an assignee to recover in his own name.—ROBINSON V. WATSON, Mich., 59 N. W. Rep. 811.

11. ATTACHMENT—Fraudulent Conveyance.—A creditor who in good fath obtains from an insolvent debtor property or security in payment of an honest debt, where the debtor may have acted with the design of delaying and defrauding other creditors, will not lose his preference by reason of notice, of the wrongful design of the debtor, providing his only purpose is to fairly obtain satisfaction or security for his own debt, and that he does not participate in the wrongful intent of the debtor.—HASIEV. CONNOR, Kan., 37 Pac. Rep. 128.

12. BANKS—Authority of President.—The president of a banking corporation has the power to employ counsel and manage the litigation of the bank, in the absence of any order of the board of directors depriving him of such power.—CITIZENS' NAT. BANK OF KINGMAN V. BERRY, Kan., 37 Pac. Rep. 131.

13. BILL OF EXCEPTIONS — Amendment.—Where the trial judge has in apt time certified to a bill of exceptions made from the stenographer's transcript, but the certificate fails to state that the bill contains all the evidence, the judge may at a subsequent term amend his certificate so as to show that the bill contains all the evidence, where the stenographer's transcript shows the evidence of each party by question and answer until they respectively rested.—CHICAGO, M. & P. RY. CO. V. WALSH, Ill., 37 N. E. Rep. 1001.

14. BOUNDARIES — Ejectment — Evidence.—Where owners of adjoining lands agree orally on a boundary line between them, but do not take possession according to the line so agreed on, the agreement is not conclusive, in ejectment, as to the location of the line.—BERGHOEFER V. FRAZIER, Ill., 37 N. E. Rep. 914.

15. CARRIERS — Connecting Lines—Copartnership.—Where connecting carriers are partners in the transportation of freight, the initial carrier cannot, by contract, limit its liability for injuries to through freight to such injuries only as occur on its line.—GULF, C. & S. F. RY. CO. V. WILBANKS, Tex., 27 S. W. Rep. 302.

16. CHATTEL MORTGAGE—Subsequent Mortgagee.—A chattel mortgage is valid without renewal, as against a subsequent mortgagee with actual notice, since he is not a mortgage "in good faith."—RIEDERER V. PFAFF, U. S. C. C. (Oreg.), 61 Fed. Rep. 872.

17. CLAIM AND DELIVERY—Procedure.—The right to maintain an action in claim and delivery is not conditioned upon the making of an affidavit and undertaking, under sections 4972, 4973, Comp. Laws, for immediate possession. — SIMPSON BRICK-PRESS CO. V. MARSHALL, S. Dak., 59 N. W. Rep. 728.

18. CONTRACT—Building—Agreement to Arbitrate.—A building contract stipulated that if alterations were ordered, and their value disputed, they should be valued by two competent persons, and these might choose an umpire, whose decision should be final: Held, that the builder could not sue for extras without an attempt to arbitrate.—BALL V. DOUD, Oreg., 37 Pac. Rep. 70.

19. CONTRACT—Consideration.—Neither the promise to do, nor the actual doing, of that which the promisor is, by law or subsisting contract, bound to do, is a sufficient consideration to support a promise in his favor.—ESTERLY HARVESTING MACH. CO. V. PRINGLE, Neb., 59 N. W. Rep. 804.

20. CONTRACT—Gambling—Stock Purchased on Margins.—Money paid a broker as margins on stock purchased by him with his own money for a customer, and retained as security until sold, may be recovered. WETMORE V. BARRETT, Cal., 37 Pac. Rep. 140.

21. CONTRACTS—Interpretation—Racing Rules.—Racing rules defined a "sweepstakes" as a race "for which the prize is the sum of the stakes which the subscribers agree to pay for each horse nominated," and provided that the entry, making one a subscriber, "shall be made by writing, signed by the owner of the horse," and that "a person entering a horse thereby becomes liable for the entrance money, stake, or forfeit:" Held, that a "free handicap sweepstakes," by an entry for which, under the rules, liability was not incurred absolutely, but only on condition that the horse should not be declared out, was not a "stake race," within the meaning of a proposal for a subsequent race with extra weight for winners of stake races.—STONE V. CLAY, U. S. C. C. of App., 61 Fed. Rep. 889.

22. CONSTITUTIONAL LAW—Arrest without Warrant.—The provision of a city's charter empowering police officers to arrest without process persons violating ordinances in their presence is not, as applied to offenses not amounting to breach of the peace, a subversion of "due process of law," nor of Const. art. 6, § 26, forbidding issue of a warrant without probable cause, supported by oath.—BURROUGHS V. EASTMAN, Mich., 59 N. W. Rep. 817.

23. CONSTITUTIONAL LAW — Mechanics' Liens.— Act June 8, 1891, providing that a contractor for the erection of a building shall be deemed the owner's agent, and that no contract between them shall interfere with the right of a subcontractor to file a mechanic's lien, unless he agrees in writing to be bound by the contract between the contractor and the owner, though it stipulate that no such lien shall be filed, violates Const. art. 1, § 1, declaring indefeasible the right of acquiring, possessing, and protecting property.—WATERS V. WOLF, Penn., 29 Atl. Rep. 646.

24. CONSTITUTIONAL LAW — Taxation of Express, Telephone, and Telegraph Companies. — An act to amend and supplement sections 2777, 2780 of the Revised Statutes of Ohio, passed April 27, 1893 (90 Ohio Laws, 330), and known as the "Nicholas Law," is not in conflict with section 2 of article 12 of the constitution,

which provides that "laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money;" and is a valid law.—STATE v. JONES, Ohio, 37 N. E. Rep. 945.

25. CRIMINAL EVIDENCE—Robbery.—On indictment for robbery, testimony that the prosecuting witness had in his possession, shortly before the alleged robbery, money of the value and description of that charged to have been taken, is admissible.—BRADLEY v. STATE, Ala., 15 South. Rep. 640.

26. CRIMINAL LAW—Assault with Intent to Kill.—On the prosecution of a saloon keeper for an assault with intent to kill, committed in his saloon, an ordinance requiring saloon keepers to give bond to keep an orderly place is not admissible, as the defendant would have the authority to prevent disorder in his saloon whether there was such an ordinance or not.—STATE v. NICKENS, Mo., 27 S. W. Rep. 339.

27. CRIMINAL PRACTICE—Abortion. — An indictment charged defendant with making public, by print and writing words and language that gave information where advice might be obtained for the purpose of procuring the miscarriage of a pregnant woman: Held insufficient, as it did not allege the manner in which the print and writing were made public.—STATE v. FISKE, Vt., 29 Atl. Rep. 633.

28. CRIMINAL PRACTICE—Forgery—Indictment.— An indictment in three counts, each charging the defendant with forging the name of a different person, is insufficient to sustain a conviction.—KOTTER v. PEOPLE, Ill., 37 N. E. Rep. 932.

29. CRIMINAL PRACTICE—Larceny — Indictment.—An information for grand larceny describing the property taken as four head of "neat cattle" is sufficiently specific.—STATE v. HOFFMAN, Kan., 37 Pac. Rep. 138.

30. CRIMINAL PRACTICE—Rape—Public Trial.—On indictment for assault with intent to rape, an order excluding all persons from the court room, except defendant and the officers of the court, violates defendant's right to a public trial, and is erroneous.—PEOPLE v. HARTMAN, Cal., 37 Pac. Rep. 153.

31. CRIMINAL TRIAL—Proof of Venue.—Where the indictment charges that the crime was committed in Madison county, Ill., evidence that it was committed in Upper Alton, without showing what county or State Upper Alton is situated, is insufficient to sustain a conviction.—MOORE v. PEOPLE, Ill., 37 N. E. Rep. 909.

32. DEDICATION.—Where the owner of land in a city, who had made a plat thereof and laid off streets and an alley running through the property, sells a lot thereof described as abutting on such alley, the alley is dedicated to the public.—VAN WIISON v. GUTMAN, Md., 29 Atl. Rep. 608.

33. DEED—Description.—A deed of so many acres out of a tract described is not void for uncertainty, but conveys a proportionate undivided interest.— LINNARTZ v. MCCULLOCH, Tex., 27 S. W. Rep. 279.

34. DEEDS—Description.—A deed describing land as beginning at a point "ranging" with the south line of a street refers to the street as extended to the property on a recorded plat, and not as it actually exists some distance away.—REID v. KLEIN, Ind., 37 N. E. Rep. 967.

35. DEED—Reformation.—The rule is that, where property has been included by mistake in a deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of equity will interfere and correct the mistake.—BURRTON LAND & TOWN CO. v. HANDY, Kan., 37 Pac. Rep. 108.

36. DEED TO "HEIRS" OF LIVING PERSON.—A deed to "C's heirs," while C is living, is void for uncertainty as to grantees.—BOOKER v. TARWATER, Ind., 37 N. E. Rep. 979.

37. DESCENT AND DISTRIBUTION.—The sole distributee of an intestate, who does not allege that there is no administrator and no creditor, cannot maintain a bill against the intestate's agent, who, in enforcing a judgment in favor of the intestate, purchased lands of the judgment debtor on execution sale, and refuses to account, whether the recovery sought be a money decree, or a recovery of the land, or an interest therein as realty.—NEWMAN v. SCHWERIN, U. S. C. C. of App., 51 Fed. Rep. 865.

38. DOWER—Mining Lease.—Where a widow is assigned dower in land subject to mining lease given by her husband and herself, which provides that the lessee shall pay annually one dollar per acre until it opens mines on the land, and shall then pay a certain royalty, and the widow is entitled to all payments falling due after her dower is assigned, although the mines have not been opened at that time.—PRIDDY v. GRIFFITH, Ill., 37 N. E. Rep. 999.

39. EMINENT DOMAIN—Equity. — Where a railroad company files a bill for the specific enforcement of a contract to convey to it land over which it has built its road, and the defendant claims that the contract has been obtained by fraud, the court may, on cross-bill, decree payment of just compensation for the land so taken by the company.—GRAND TOWER & C. G. R. CO. v. WALTON, Ill., 37 N. E. Rep. 920.

40. ESTOPPEL—Acquiescence.—A party is estopped from denying the truth of averments in his own pleadings.—HOLTRY v. FOLEY, Neb., 59 N. W. Rep. 781.

41. EVIDENCE — Execution of Note.—In case subscribing witness is absent from the county in which the suit is pending, or if he denies, or does not recall, the execution of the instrument to which his name is subscribed as such witness, its execution may be established by other competent evidence.—JEWELL v. CHAMBERLAIN, Neb., 57 N. W. Rep. 784.

42. EVIDENCE—Life Insurance.—In an action on a life policy, defendant's medical examiner, who recommended insured as a good risk, cannot be asked if he would have done so had he known that insured's mother, sister, and two brothers had died of consumption.—METROPOLITAN LIFE INS. CO. OF NEW YORK v. ANDERSON, Md., 29 Atl. Rep. 606.

43. EVIDENCE— Self serving Declarations. — Prior statements of a party to an action are not admissible to corroborate his testimony when the circumstances surrounding him at the time the statements were made show that his own interests were being subserved thereby.—SILVA v. PICKARD, Utah, 37 Pac. Rep. 86.

44. EXECUTION — Issuance against Non-resident.—Under Rev. St. 1889, § 6287, providing that no execution shall issue from the Circuit Court on a transcript from a justice, where the defendant is a resident of the county, unless an execution from the justice has been issued and returned *nulla bona*, an execution issued from the Circuit Court without such prior return is valid if the defendant is a non-resident at the time of issuance.—HUHN v. LANG, Mo., 27 S. W. Rep. 345.

45. FEDERAL OFFENSE—Post Office—Obscene Letters.—An obscene letter constitutes non-mailable matter (25 Stat. 496), although no obscene matter appears on the envelope.—UNITED STATES v. NATHAM, U. S. D. C. (Iowa), 61 Fed. Rep. 936.

46. FRAUDULENT CONVEYANCE — Intent.—Where the existence of a fraudulent intent in making and receiving a transfer of a debtor's property is to be determined by evidence collateral to the writing, whereby was effected the alleged fraudulent transfer, such question is determinable alone by the jury.—WILLIAM B. GRIMES DRY GOODS CO. v. SHAEFFER, Neb., 59 N. W Rep. 741.

47. FRAUDULENT CONVEYANCES — Withholding Deed from Record.—Absolute deeds given by one banking house to another as security for loans and discounts, and withheld from record for three years, so as not to injure the debtor's credit, are, as a matter of law,

fraudulent as to subsequent creditors.—STATE SAV. BANK OF ST. JOSEPH V. BUCK, Mo., 27 S. W. Rep. 341.

48. GARNISHMENT—Service on Foreign Corporation.—How. St. § 7086, authorizing summons of garnishment upon foreign corporations to be served by leaving a copy with any officer, member, clerk, or agent within the State, applies only to garnishment proceedings in which the original suit is instituted by attachment.—KIRBY CARPENTER CO. V. TROMBLEY, Mich., 59 N. W. Rep. 809.

49. HOMESTEAD—Attachment.—The homestead character of real estate upon which attachment process has been levied is not a proper question to be heard and determined upon a motion to discharge the attachment, and should not be included in the motion as one of the grounds for such discharge, and should not be entertained by the court or judge if so included.—QUIGLEY V. MCEVONY, Neb., 59 N. W. Rep. 767.

50. HOMESTEAD—What Constitutes.—Complainant's husband sold a homestead to pay an incumbrance thereon, and with the remainder to buy a home. He bought a lot, placing the title in complainant, purchased the materials, and contracted for the erection of a house thereon, in which they intended to live: Held, that the lot was a homestead.—MYERS V. WEAVER, Mich., 59 N. W. Rep. 810.

51. INJUNCTION—Injunction Bond.—Code, § 3613, authorizing appeals from all interlocutory orders sustaining or dissolving injunctions, does not authorize an appeal from an order made on motion to discharge an injunction; the remedy is by *mandamus*.—EX PARTE FECHHEIMER, Ala., 15 South. Rep. 647.

52. INTOXICATING LIQUOR—Sales—Indictment.—An indictment which charges that the accused, on the 4th day of July, A. D. 1893, "and at divers other days, both before and after that date," did unlawfully sell certain intoxicating liquors to divers persons, whose names to the grand jury are unknown, charges but one offense. The clause, "and on divers other days," etc., may be rejected as surplusage.—STATE V. BOUGHNER, S. Dak., 59 N. W. Rep. 736.

53. JUDGMENT — Alteration—Justices of the Peace.—Where a justice, eight days after rendering judgment in accordance with the verdict of the jury, changes the judgment, as to costs, without having jurisdiction to do so, *certiorari* is the proper remedy.—STATE V. CASE, Mont., 37 Pac. Rep. 95.

54. JUDGMENT — Jurisdiction of State and Federal Courts.—The judgment of an Indiana court, on the appeal of a railroad company from the action of county drainage commissioners, is conclusive in respect to the benefits and damages accruing to a railroad from the improvement of an unnavigable stream which passes under the track; and although the judgment assesses benefits, but no damages, a Federal Court has no jurisdiction to enjoin the making of the improvement, on the ground that the company is engaged in interstate commerce, is carrying the mails, and that the use of the road will be interrupted, and the company put to great expenses in rebuilding its bridge.—LAKE ERIE & W. R. CO. V. SMITH, U. S. C. C. (Ind.), 61 Fed. Rep. 885.

55. LANDLORD AND TENANT—Lease—Surety.—Where a lease is made to several persons, one of whom is designated as "surety," and signs as such, and all parties execute it at the same time, on the same consideration, and without any condition, it is an original undertaking as to such person, so that he may be sued thereon jointly with the others for rent, though he never occupied the premises.—BOWEN V. CLARK, Oreg., 37 Pac. Rep. 74.

56. LANDLORD AND TENANT—Lease—Implied Covenants.—Plaintiff leased land of defendant, on which were springs, the water from which flowed on the land of W, who had the sole title to the water by original appropriation for irrigation: Held, that the general covenant of title implied by the words "lease and demise," used in the lease, was limited by a covenant that the lessee should quietly keep the premises "without hindrance or molestation from the said lessor, or anybody claiming by, through, or under it," and that plaintiff could not recover for the loss of the use of the water, as W did not claim by, through, or under it.—GROOME V. OGDEN CITY, Utah, 37 Pac. Rep. 90.

57. LANDLORD AND TENANT—Parol Leases.—There is a very obvious difference between a parol agreement to make a written lease and a parol lease with a further or incidental agreement that it shall be put in writing. In the one case the making of the writing is the subject of the agreement, and only that can execute it; in the other, the subject is the act or fact of present leasing, and its subsequent reduction to writing is incidental only.—GRIGSBY V. WESTERN UNION TEL. CO., S. Dak., 59 N. W. Rep. 734.

58. LEGISLATIVE APPROPRIATION—Payment by State Auditor.—An attorney's lien for services rendered his client cannot be successfully asserted against money appropriated to such client by an act of the legislature while such money is in the custody or under the control of the State treasurer.—STATE V. MOORE, Neb., 59 N. W. Rep. 755.

59. LIABILITY OF INDORSER.—In an action against the indorser of a note, the complaint alleged presentment for payment, refusal, notice, and defendant's request to plaintiff not to sue the maker: Held, that defendant's liability on the note was fixed irrespective of such request, and that such request became no part of the contract of indorsement so as to make it a verbal contract and barred by the statute because not sued on within six years.—HOFFMAN V. HOLLINGSWORTH, Ind., 37 N. E. Rep. 960.

60. LIFE INSURANCE—Estoppel.—Where a life insurance policy recites that it is issued on the application of the insured, and the company takes the note of the beneficiary, a grandson of the insured, in payment for the first premium, there being no deception as to the real party to the insurance, the company is estopped to deny that the policy was issued on the application of the insured.—MUTUAL LIFE INS. CO. OF NEW YORK V. BLODGETT, Tex., 27 S. W. Rep. 286.

61. MANDAMUS TO JUDGE.—When a retiring judge filed conclusions of law and fact, and directed the counsel to prepare an interlocutory judgment for the purpose of an accounting between the parties, a *mandamus* will not be granted to compel his successor to enter judgment on such findings, as until final judgment the trial court is not concluded by any of its orders, and its judicial discretion cannot be directed by *mandamus*. — BRODER V. SUPERIOR COURT OF MONO COUNTY, Cal., 37 Pac. Rep. 143.

62. MARRIAGE—Annulment.—The Circuit Court cannot, at the instance of a divorced husband, declare void a subsequent marriage between the divorced wife and another, on the ground that the divorce was illegal, as Code 1888, art. 62, § 12, empowering such courts to annul marriages, applies only to cases in which one of the parties to a marriage asks to have it annulled.—RIDGELY V. RIDGELY, Md., 29 Atl. Rep. 597.

63. MASTER AND SERVANT — Fellow-servants. — The mate of a ship engaged in carrying freight and passengers between distant points is a fellow-servant of a man employed in the steward's department to wait on the officers' table.—LIVINGSTON V. KODIAC PACKING CO., Cal., 37 Pac. Rep. 149.

64. MASTER AND SERVANT — Fellow-servants. — A switchman uncoupling cars in a railway yard is a fellow servant of a locomotive engineer who injured him by an unexpected movement of the train in response to a signal from employees thereon.—RUTLEDGE V. MISSOURI PAC. RY. CO., Mo., 27 S. W. Rep. 327.

65. MASTER AND SERVANT — Injury—Assumption of Risk.—Plaintiff was engaged in loading iron for defendants. While attempting to lift on a car a piece of iron, one end of which was not raised to the top of the car, it struck the side of the car, and bounded back on plaintiff. Plaintiff was accustomed to loading iron

an know ho[illegible] y men were necessary to load iron of that size. He testified that it required from six to ten men to load that kind of iron, while only five handled this one: Held, that plaintiff was not entitled to recover, since he knew, as well as defendants, the danger of loading the iron with that number of men.—EDD. v. ROGERS, Tex., 27 S. W. Rep. 295.

66. MASTER AND SERVANT—Injury to Servant—Lineman of Electric Company.—The liability of a master to a servant for an injury received in his employ will be established by proof that the injury was caused by the master's willful wrong-doing, or resulted from his breach of a duty owed to the servant arising out of the relation between them.—ESSEX COUNTY ELECTRIC CO. v. KELLY, N. J., 37 N. E. Rep. 427.

67. MASTER AND SERVANT—Negligence.—In an action for injuries received in defendant's mine, one of the witnesses spoke of it as defendant's mine, and a surgeon who attended plaintiff for said injuries testified to the effect that his services were paid for by the defendant: Held, that this evidence was sufficient *prima facie* proof of defendant's ownership of the mine.—CONSOLIDATED COAL CO. OF ST. LOUIS v. BRUCE, Ill., 37 N. E. Rep. 912.

68. MASTER AND SERVANT—Negligence—Stockholder.—The mere fact that a coal miner engaged by a mining corporation in sinking a coal shaft in the ground is a small stockhholder of the corporation will not prevent him from recovering damages for a personal injury caused by the negligence of the corporation. Such a stockholder has no personal control or management of the coal shaft, or of the corporation or its property.—MORBACH v. HOME MIN. CO., Kan., 37 Pac. Rep. 122.

69. MASTER AND SERVANT — Vice-principals.—The train dispatcher of a division who, in directing the movements of two trains which are being run entirely on special orders, makes a mistake, whereby the trains collide, is a vice principal as to the fireman on the engine of one of them, who is injured thereby.—HANKINS v. NEW YORK, L. E. & W. R. CO., N. Y., 37 N. E. Rep. 468.

70. MECHANIC'S LIEN.—Under Hill's Code, 3673, requiring the claimant to state the name of the owner of a building sought to be charged, a statement that claimants furnished materials to be used in a building for H on land owned by him is sufficient.—CURTIS v. SESTANOVICH, Oreg., 37 Pac. Rep. 67.

71. MECHANIC'S LIEN.—An affidavit for a mechanic's lien, in terms against the "Navarro County Fair Association," is sufficient to establish a lien against the "Navarro Fair Association." — WHITESELLE v. TEXAS LOAN AGENCY, Tex., 27 S. W. Rep. 309.

72. MECHANICS' LIENS — Notice.—Under Rev. St. ch. 82, § 31, which declares that a subcontractor's notice "shall be served within 40 days from the completion of said subcontract or within 40 days after payment should have been made," such notice may be served before the subcontract has been completed, or the payment fallen due.—CAREY-LOMBARD LUMBER CO. v. FULLENWIDER, Ill., 37 N. E. Rep. 899.

73. MINES AND MINING — Location.—Where the discoverer of a mineral lode, instead of marking out his claim, takes three months in exploring the lode, and some one else, in his absence, makes a valid location on the find, the latter is entitled to the claim, under Rev. St. U. S. ch. 6, tit. 32, providing that "the location must be distinctly marked on the ground;" and the discoverer is not entitled to any time before marking out his claim for exploring his find, in the absence of local custom or statute.—PATTERSON v. TARBELL, Oreg., 37 Pac. Rep. 76.

74. MINING LEASE—Royalty.—A written agreement by the owner of coal land, giving another the exclusive right to mine coal on such land for a term of years is not a mere license, but an assignable lease.—CONSOLIDATED COAL CO. OF ST. LOUIS v. PEERS, Ill., 37 N. E. Rep. 937.

75. MORTGAGE — Foreclosure—Cross Bill.—Where a suit to foreclose a mortgage is brought against the mortgagor and a grantee of the equity of redemption, a cross bill by the mortgagor to set aside the conveyance of the equity of redemption is germane to the original bill.—DAWSON v. VICKERY, Ill., 37 N. E. Rep. 910.

76. MUNICIPAL CONTRACTORS. — The awarding of a contract by a municipal corporation for an improvement for it is a sufficient consideration to support the promise of a contractor, made to the corporation, to pay for all labor and material furnished him in executing said contract.—DOLL v. CRUME, Neb., 59 N. W. Rep. 806.

77. MUNICIPAL CORPORATION — Negligence.—Where there is a cellar way or opening 17 feet and 5 inches in length and 9 feet and 8 inches in depth on the side of a building adjoining an alley open for public travel, and such cellar way or opening is all located on and in the alley, and not on a lot or private ground, and has no railing, guard, or other protection around it, and a person walking in the alley upon a dark night, falls theron, without any negligence upon his part, held, that the city is liable for the injuries sustained thereby.—FLETCHER v. CITY OF ELLSWORTH, Kan., 37 Pac. Rep. 115.

78. MUNICIPAL CORPORATION — Changing Grade of Streets.—Rev. St. 1889, § 1303, forbidding appropriations in excess of revenue, and annulling acts of officers which impose on the city liability for money not appropriated, does not exempt a city from its constitutional liability for damages for change of a street grade, though no money has been appropriate 1 therefor.—SMITH v. CITY OF ST. JOSEPH, Mo., 27 S. W. Rep. 344.

79. MUNICIPAL CORPORATION—Dedication—Abandonment.—The nonuser of a dedicated street, though extending through the period covered by the statute of limitations applicable in cases of adverse possession, will not constitute an abandonment of the street as a street can only be abandoned by a proceeding to vacate the same.—CITY OF LAWRENCEBURGH v. WESLER, Ind., 37 N. E. Rep. 956.

80. MUNICIPAL CORPORATION — Negligence — Contractor.—If one attempts to pass over a place of danger the law requires him to exercise caution commensurate with the obvious peril, but this means that the law only requires of the party to exercise ordinary care, the danger and his knowledge thereof considered.—CITY OF BEATRICE v. REID, Neb., 59 N. W. Rep. 770.

81. MUNICIPAL CORPORATION—Paving of City Street.—An ordinance providing for the paving of a street, to be paid for by special assessment, is not void because it does not provide for manholes and catch-basins to convey away the surface water.—VANE v. CITY OF EVANSTON, Ill., 37 N. E. Rep. 901.

82. MUNICIPAL CORPORATIONS—Public Improvements—Taxation.—Though a judgment against a town, on which execution has been returned unsatisfied, does not adjudicate the amount of the recovery against any particular fund, the liability on which it was rendered may be shown to have been incurred for any of the purposes for which the city may levy a tax; and, where the power to levy a tax for that purpose has not been exhausted, *mandamus* will lie to compel the levy of a specific tax for the payment of such judgment.—SANDMEYER v. HARRIS, Tex., 27 S. W. Rep. 284.

83. MUNICIPAL CORPORATIONS—Street Assessments.—Where a special tax is levied for grading and paving a street, the municipality cannot be assessed for the benefit done to cross streets, since such cross streets do not constitute abutting property.—HOLT v. CITY OF EAST ST. LOUIS, Ill., 37 N. E. Rep. 927.

84. MUNICIPAL CORPORATIONS—Special Assessments.—Rev. St. ch. 24, art. 9, § 1, confers power on cities to make local improvements by special assessment as the city authorities "shall by ordinance prescribe." Section 19 declares that whenever such improvements are to be made by special assessment, the council shall

pass an ordinance to that effect; and section 20 requires the council to appoint a committee to estimate the cost of the improvement: Held, that a city which had accepted and adopted improvements made without being previously authorized by ordinance could not levy a special assessment to pay therefor.—CITY OF EAST ST. LOUIS V. ALBRECHT, Ill., 37 N. E. Rep. 934.

85. NEGOTIABLE INSTRUMENT — Note—Action by Indorsee.—In an action by the transferee of a negotiable promissory note, properly indorsed before maturity, the production of the note shows *prima facie* that he is a *bona fide* holder, and is sufficient to entitle him to recover.—MCDONALD V. AUFDENGARTEN, Neb., 59 N. W. Rep. 762.

86. NEGLIGENCE OF CHILD — Imputed Negligence.—The negligence of a parent in permitting a child of tender years to wander on a railroad track cannot be imputed to the child, so as to bar an action by the child against the company for injuries sustained through the negligence of the train hands.—BOTTOMS V. SEABOARD R. R. CO., N. Car., 37 N. E. Rep. 730.

87. NEGLIGENCE — Railroad Companies.—A railroad company agreed to transport on its line a locomotive engine belonging to another road, and placed it in charge of one of its conductors, who ran it under orders from the train dispatcher, although the mechanical work of running the engine was done by an engineer and fireman of the road that owned the engine: Held, that the company over whose road the engine ran was responsible for its loss, caused by violation of orders of the train dispatcher, since that company was in sole control of the engine.—TERRE HAUTE & I. R. CO. V. CHICAGO, P. & ST. L. RY. CO., Ill., 37 N. E. Rep. 915.

88. NEGOTIABLE INSTRUMENT — Note—Alteration by Servant.—Where a salesman, who has no general authority to make settlements or take notes on their account, is directed by his employers to take the note of certain debtors for the amount of their account, a material alteration of the note by him before he delivers it to his employers, without their knowledge, and not ratified by them, is the act of a stranger, and the note is enforceable against the makers in its original form.—KINGAN & CO. V. SILVERS, Ind., 37 N. E. Rep. 413.

89. NUISANCE—Prescription.—A prescriptive right to use a stream in a manner amounting to a public nuisance cannot be acquired so as to be a defense to an action by a private party especially injured thereby to adjoin the maintenance of the same.—BOWEN V. WENDT, Cal., 37 Pac. Rep. 149.

90. PARTITION SALE.—Where trustees, by order of court, sell in a body a tract of land which is divided into lots, for a fair price, and the sale is fairly conducted, and the evidence is conflicting as to whether it would have brought more if sold by lots, a decree of the court overruling exceptions to the sale will not be reversed.—HOPPER V. HOPPER, Md., 29 Atl. Rep. 611.

91. QUIETING TITLE.—A suit to have deeds declared a cloud on plaintiff's title cannot be maintained where the complaint shows that plaintiff is out of possession, and his right to possession denied by defendant.—EDGAR V. EDGAR, Oreg., 37 Pac. Rep. 73.

92. QUIETING TITLE—When Lies.—Any person claiming title to real property in this State, whether in or out of possession, may maintain an action against any person or persons claiming adversely, for the purpose of determining such estate and quieting title.—FOREE V. STUBBS, Neb., 59 N. W. Rep. 798.

93. RAILROAD COMPANIES—Accidents at Crossings.—Whether a person injured was exercising ordinary care is a question of fact.—LAKE SHORE & M. S. RY. CO. V. OUSKA, Ill., 37 N. E. Rep. 897.

94. RAILROAD COMPANIES—Accidents at Crossings—Negligence.—Evidence that a locomotive was run in the dark along a much frequented street, at a high and dangerous rate of speed, without headlight lighted or bell ringing, is sufficient to show wanton and willful negligence.—EAST ST. LOUIS CONNECTING RY. CO. V. O'HARA, Ill., 37 N. E. Rep. 917.

95. RAILROAD COMPANY—Closing Street—Private Way.—Where a person purchases a lot in a platted addition to a city, he acquires a private right of way over the streets thereof; and the fact that such a street is afterwards taken as a highway does not prevent the owner of the lot from recovering damages from a railroad company which closes such streets, so as to leave his lot in a "*cul de sac*," for the actual injuries to his lot.—JOHNSEN V. OLD COLONY R. CO., R. I., 61 Fed. Rep. 594.

96. RAILROAD COMPANY—Lease.—Where all the property of a railroad company owning a lease of part of another road is sold under foreclosure, and becomes the property of a new company, which takes possession of and uses all its property, the new road, as successor of the other, is liable for the use and occupation of such leased line, even though there has been no formal assignment of the lease.—JACKSONVILLE, L. & ST. L. RY. CO. V. LOUISVILLE & N. R. CO., Ill., 37 N. E. Rep. 924.

97. RAILROAD COMPANY—Licensee at Depot.—A railroad company is liable for injuries to one who comes to the depot to meet friends, caused by failure to keep the station platform in a reasonably safe condition and reasonably well lighted.—NEW YORK, C. & ST. L. R. CO. V. MUSHRUSH, Ind., 37 N. E. Rep. 954.

98. RAILROAD MORTGAGES—Foreclosure.—Held, section 44, ch. 81, Gen. St., 1878, does not apply to the foreclosure of an ordinary railroad mortgage, or limit the amount of attorney's fees, which may, by the terms of the mortgage, be allowed in case of foreclosure.—SEIBERT V. MINNEAPOLIS & ST. L. RY. CO., Minn., 59 N. W. Rep. 826.

99. RAILROAD MORTGAGE—Foreclosure Proceeding.—While it is a rule that when a note or bond is, by its provisions, payable out of a particular fund, and no other provision is made for its payment, the liability to pay it exists only when the funds exist, and to the extent of that fund; but held, this rule does not apply where the mortgage securing the bond provides also another fund out of which the bond is made payable, but in such case the bond is payable out of either or both funds.—SEIBERT V. MINNEAPOLIS & ST. L. RY. CO., Minn., 59 N. W. Rep. 822.

100. REAL ESTATE AGENT—Commissions from Vendee.—A real estate agent is not entitled to commissions from the vendee, as agreed on between them, where the agent asks the vendee a price greatly in excess of that fixed on the land by the vendor, and conceals from the vendee the fact that the vendor had instructed him to sell to the former at the reduced price.—PHINNEY V. HALL, Mich., 59 N. W. Rep. 814.

101. REAL ESTATE BROKERS — Commissions.—In an action for commissions for selling lands, where defendant admits that she referred plaintiff to her son, but it is in issue whether she referred plaintiff to him as having authority to sell the land to plaintiff, or as having authority to authorize plaintiff to sell the land as broker, a charge that, if defendant referred plaintiff to her son, she would be liable on any contract made by her son, authorizing plaintiff to sell the land, is erroneous.—HENSEL V. MAAS, Mich., 59 N. W. Rep. 808.

102. RECEIVER — Appointment— Pledge. — Where a corporation, before it became insolvent, pledged certain property, with power of sale, to a bank to secure loans, the court cannot, after appointing a receiver, compel the bank to turn over the property to the receiver, without first requiring payment to the bank of the amount of the loans.—NATIONAL EXCH. BANK V. BENBROOK SCHOOL FURNISHING CO., Tex., 27 S. W. Rep. 297.

103. REPLEVIN— Claim under Chattel Mortgage.—In a replevin suit, by the holder of a chattel mortgage to recover possession of the property described therein from a person other than such mortgagor, there is

no presumption of law that the person who made such mortgage was at the time either the owner of or in possession of the property mortgaged.—MUSSER v. KING, Neb., 59 N. W. Rep. 744.

104. RES JUDICATA.—A party to an action for partition, who acquires an independent title by deed pending the suit and before decree, and who does not assert such title in that action, will be concluded by the judgment therein from setting up such title in a subsequent action for the partition of the same property.—PHILLIPS v. WINTER, Cal., 37 Pac. Rep. 154.

105. REWARD—Action to Recover.—A complaint in an action to recover a reward offered for the production of a letter, which, after alleging the offer, alleges that plaintiff, "in consideration of said offer, promise, and agreement on the part of defendant," produced the letter, sufficiently shows that plaintiff knew the reward had been offered, and produced the letter in reliance on defendant's promise.—WILSON v. STUMP, Cal., 37 Pac. Rep. 151.

106. SALE BY COMMISSION MERCHANT—Right to Profits.—An agent employed to sell flour on commission is presumed to act for his principal in making sales, unless it clearly appears that it was understood between the parties that the agent was dealing in the particular transaction with the principal on its own account, and, where it does not so appear, profits obtained by the agent in the sale of the principal's goods belong to the principal.—THAYER v. HOFFMAN, Kan., 37 Pac. Rep. 125.

107. SALE OF GOODS—Passing of Title.—A vendor who sells and delivers goods at prices and on terms of payment definitely fixed by the contract, but retains the right to elect to take the goods remaining unsold by his vendee as the property of the vendor, is not the owner of the goods until after the actual exercise of such election, and creditors of the vendee who attach such goods prior to any election by the vendor acquire a valid lien thereon.—MOLINE PLOW CO. v. RODGERS, Kan., 37 Pac. Rep. 111.

108. SUPPLEMENTARY PROCEEDINGS.—Where, in supplementary proceedings for the examination of a third party alleged to be indebted to the execution defendant, such party in good faith denies any indebtedness, the question of fact whether he is so indebted or not cannot be tried and determined in such proceeding.—THOMPSON & SONS MANUF'G CO. v. GUENTHNER, S. Dak., 59 N. W. Rep. 727.

109. TAXATION—Assessment—Bank Deposit.—2 Starr & C. Ann. St. ch. 120, § 25, provides that a schedule of personal property for taxation shall state, among other things, "the amount of moneys" of the taxpayer, and also the amount of his credits; and section 27 provides that the person making the schedule may deduct from his credits the amount of his *bona fide* indebtedness: Held, that debts cannot be deducted from money deposited in bank.—MORRIS v. JONES, Ill., 37 N. E. Rep. 928.

110. TAXATION—Enjoining Collection.—A bill to enjoin the collection of taxes will be dismissed when no tender is made of the amount of taxes admitted to be legally due.—WELCH v. CITY OF ASTORIA, Oreg., 37 Pac. Rep. 66.

111. TAXATION—Review of Assessment.—Rev. St. ch. 120, § 88, provides that township boards of review shall sit on the fourth Monday of June, and that the assessment of all property assessed after that date, and of all property of which the owner has applied to the town board for revision of assessment, and has appealed from its decision, may be revised by the county board: Held, that the county board had no jurisdiction to revise assessments made before the fourth Monday in June, where no appeal has been taken to the decision of the town board on such assessments.—WORKINGMEN'S BANKING CO. v. WOLFF, Ill., 37 N. E. Rep. 930.

112. TAX LIEN—Foreclosure.—To uphold the validity of a tax lien sought to be foreclosed, neither a levy nor assessment of taxes will be presumed from the mere introduction in evidence of a treasurer's certificate of a purchase at tax sale, when the existence of such levy and assessment have been put in issue by the answer.—MERRILL v. WRIGHT, Neb., 59 N. W. Rep. 787.

113. TAXES—Payment by Check.—There is no rule of law which requires an action by injunction for equitable relief to be brought within any given time. Whether the bringing of an action in equity has been unreasonably delayed, and whether the complainants therein have been guilty of laches in not bringing it sooner, are questions to be determined from the facts and circumstances in the case.—RICHARDS v. HATFIELD, Neb., 59 N. W. Rep. 777.

114. TAX SALES.—Where land is sold by the sheriff under execution on the judgment for taxes, the fact that the collector purchases the land does not render the sale void as against public policy.—WALCOT v. HAND, Mo., 27 S. W. Rep. 331.

115. TENANCY IN COMMON.—Where there is a contract between the owner of land and another person, whereby such other person is to cultivate the land and harvest the hay for a share thereof, but where the relation of landlord and tenant is not created, and there is no specific agreement as to the possession of the land, the parties become tenants in common of the grass and hay.—REED v. MCRILL, Neb., 59 N. W. Rep. 775.

116. TRUST DEED—Sale.—A trustee in a trust deed is under no duty to make efforts to procure bidders for the property, when a sale is contemplated, other than to advertise the property for sale, nor to give the grantor personal notice of the sale.—HARLIN v. NATION, Mo., 27 S. W. Rep. 330.

117. WAREHOUSEMAN—Shipment to Wrong Person.—A complaint alleging that plaintiff, a warehouseman, was induced by the fraudulent representations of defendant to ship him a certain quantity of wheat, which defendant converted, will support a judgment for plaintiff for the value of the wheat as for goods sold and delivered, though the evidence fails to show that its delivery was procured by fraud.—MILLER v. HIRSCHBERG, Oreg., 37 Pac. Rep. 85.

118. WATERS—Irrigation—Prior Appropriator.—A prior appropriator of water for irrigation purposes abandons his right to increase the appropriation by failing for 13 years to increase the area cultivated, during which time subsequent rights have accrued.—LOW v. RIZOR, Oreg., 37 Pac. Rep. 82.

119. WILL—Defeasible Estate.—Testator gave to his grandson certain property on the condition that if the grandson died, leaving no issue, the property devised should go to plaintiff: Held, that the grandson took a conditional fee, defeasible on his dying without issue, and that, on his death without issue, plaintiff became entitled to the property.—NEWSON v. HOLESAPPLE, Ala., 15 South. Rep. 644.

120. WILL—Nature of Estate.—The first clause of a will read: "I leave all my property in the hands of my wife, to manage to the best interests of our children and herself." Subsequent clauses gave her power to sell part of the testator's land, if necessary to pay debts, and provided that his farm must not be sold while testator's wife lived, but that at her death it might be divided between his children: Held, that the wife took no trust estate, but that upon the testator's death his estate vested in his heirs, subject to the power of the wife to manage it during her life for the benefit of herself and the children.—ALLEN v. MCFARLAND, Ill., 37 N. E. Rep. 1006.

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